ADDITION TO

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 599.

THE UNITED STATES, APPELLANT,

vs.

THE CHANDLER-DUNBAR WATER POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 3, 1908.

(21002)

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MAP OF
the Village of
Sault Ste Marie
Mich

Head of Rapids

Foot of Rapids

Indian Reserve

Race Way

Rail Road
Proposed Canal

Landing

Fort Brady

P.E. Church

American Fur Comp.

Mr. Mission

Baptist Mission

Garrison Cemetary

Principal Meridian

Line between Sections 5 & 6 N. 47 W. R.

Ferncomb

Eamans

Conrads

Mead
Stafford

V. Rensselaer

Ashman

Bonard

Brisbin

Barbeau

Mitchell

Meldrum

Bonard

Gagnon

Dousman

Mitchell

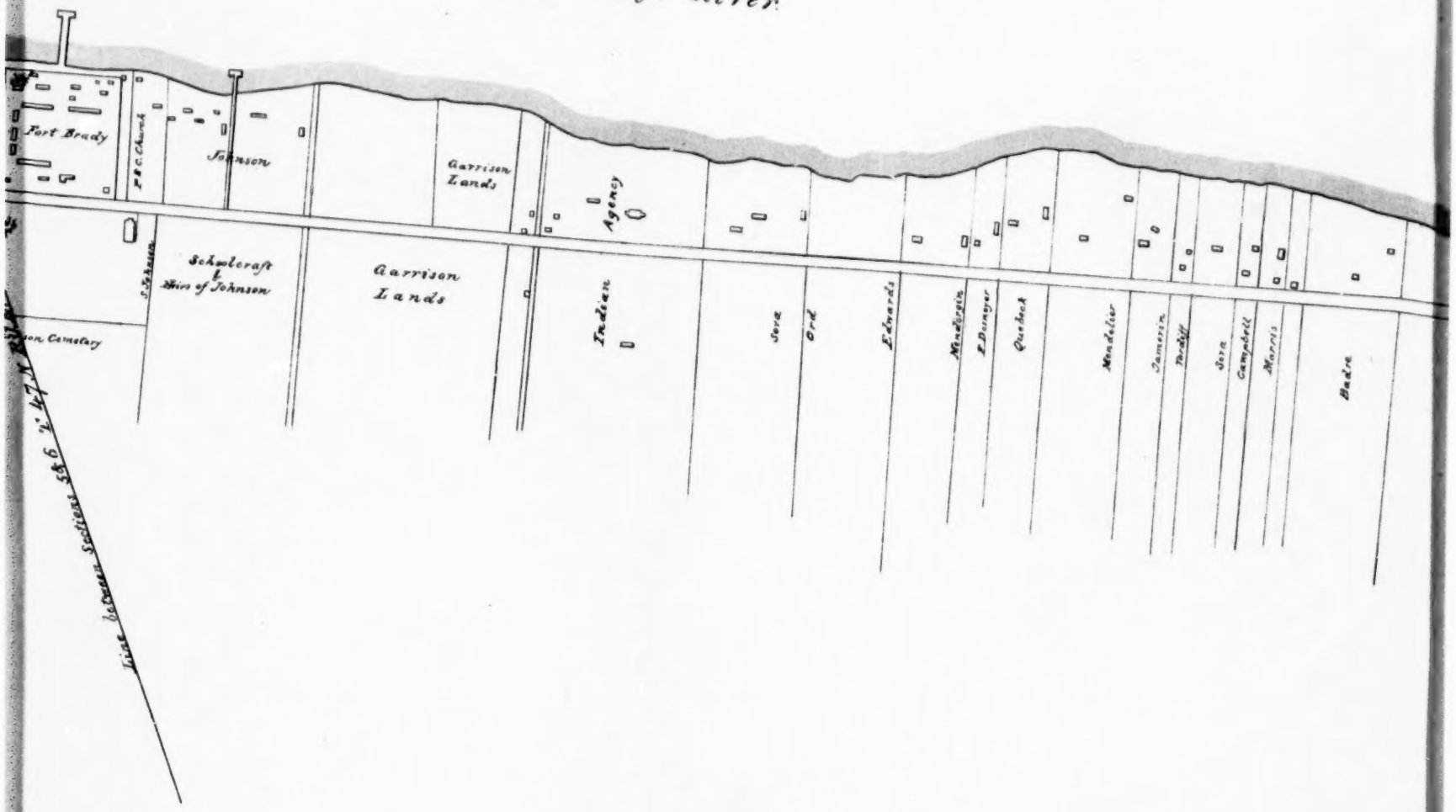
Cadotte

Ashman

MAP OF
Village of
St Marie
Mich

Copy of Map, being a part of Complainant's Exhibit No. 14.

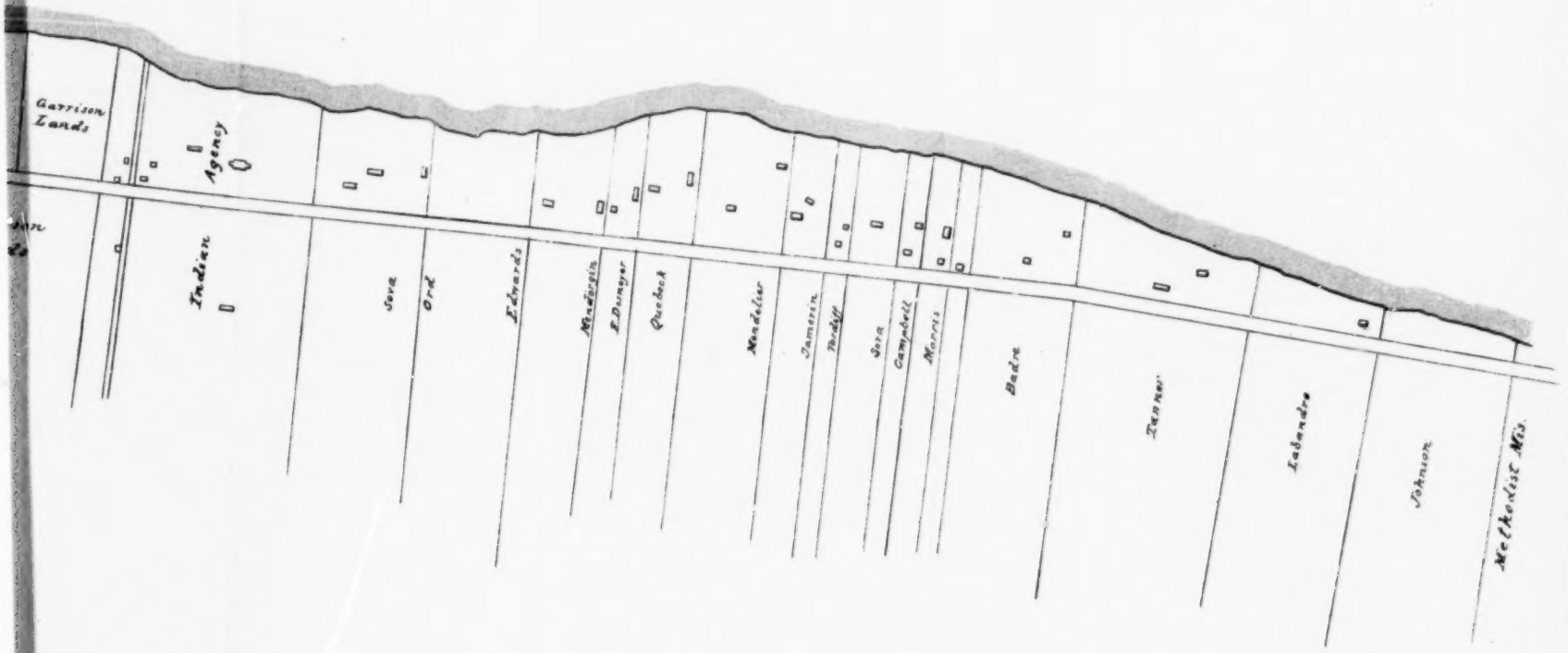
(Record, pages 143-145)



being a part of Complainant's Exhibit No. 14.

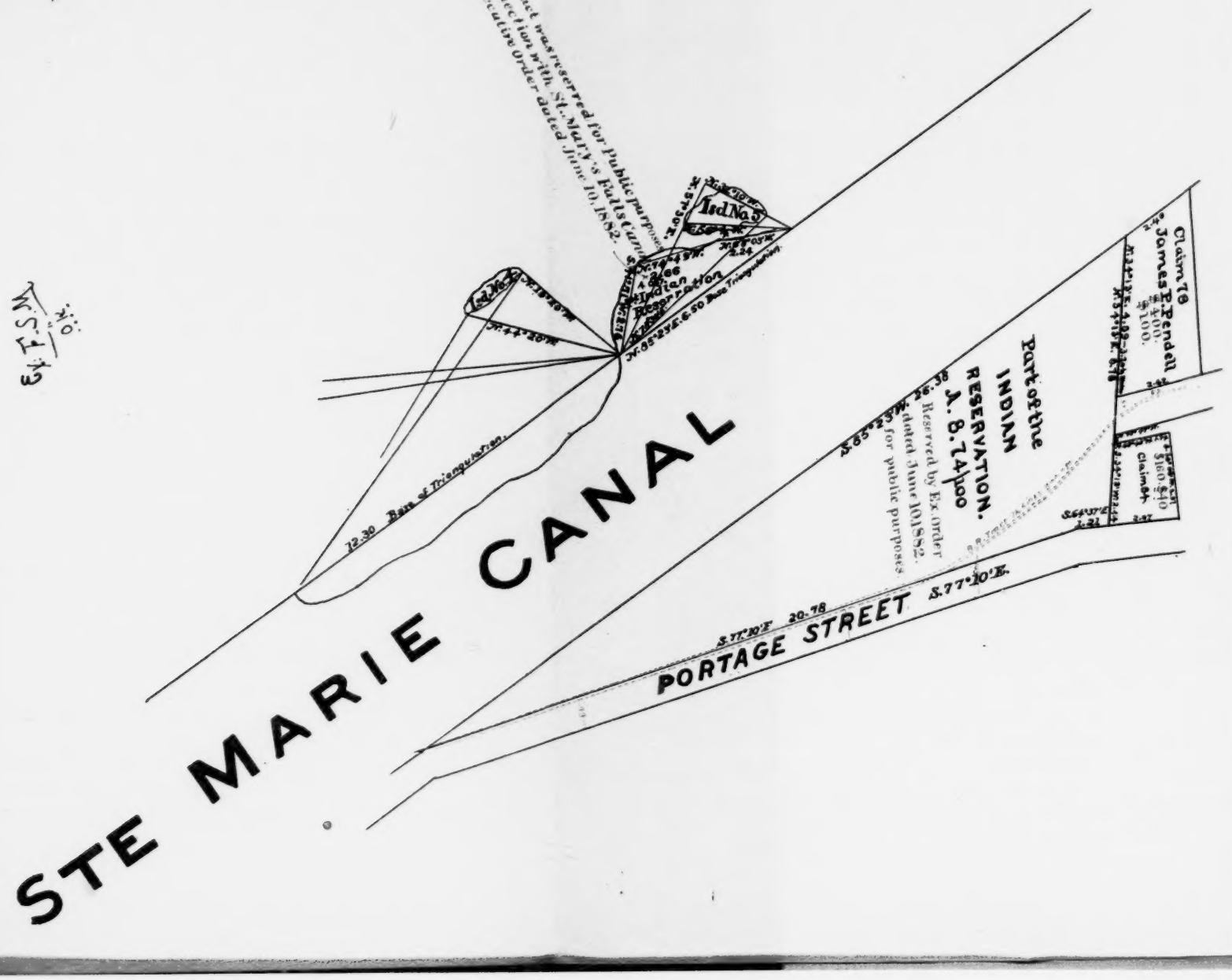
(Record, pages 143-145)

Saint Mary's River.



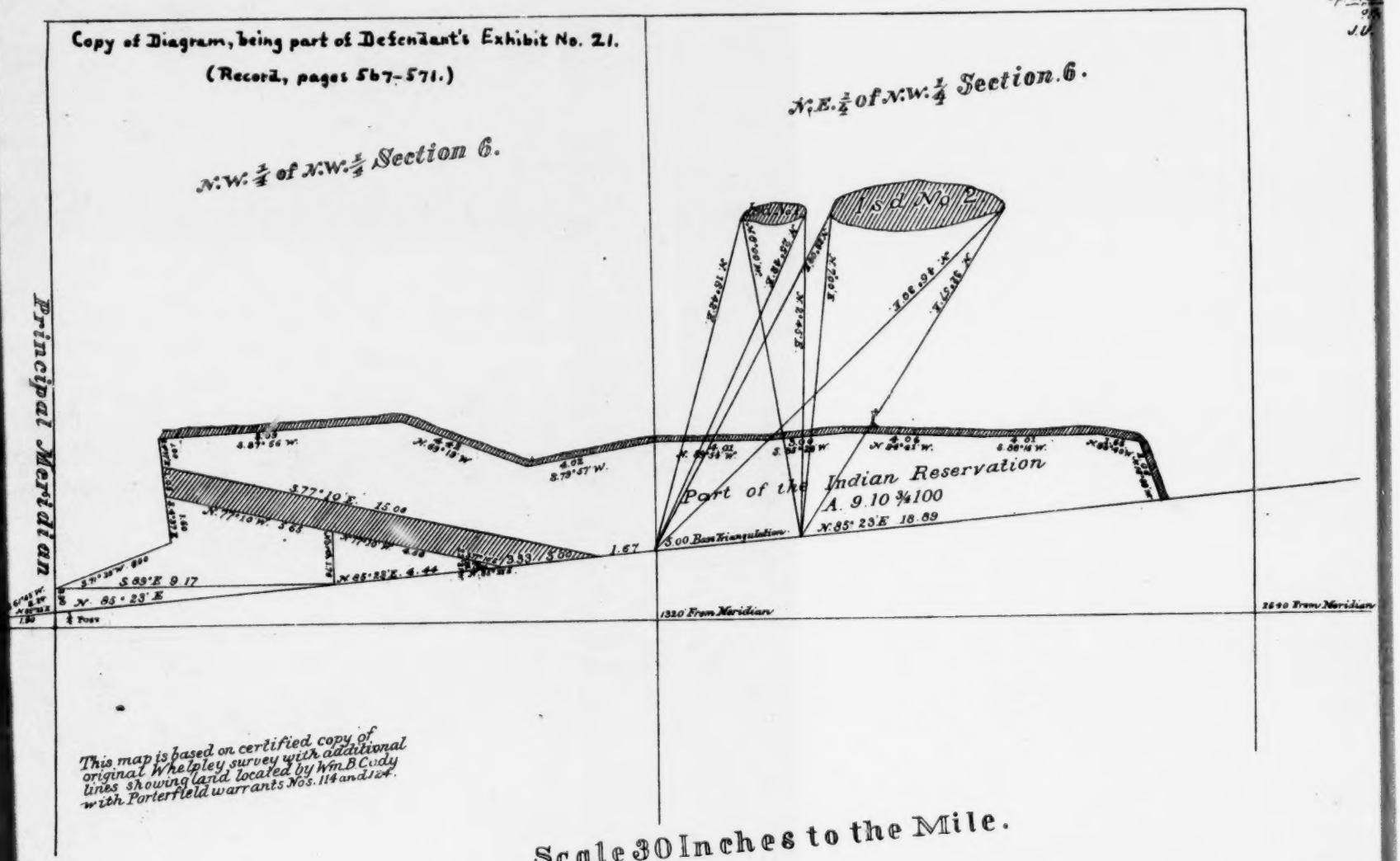
Copy of Diagram, being part of Defendant's Exhibit No. 9.

(Record, pages 321-322.)


This tract was reserved for public purposes in connection with St. Mary's Falls Canal by Executive Order dated June 10, 1882.
1st No. 3
1st No. 2
1st No. 1
Indian Reservation
N. 85° 22' E. 6.50 Base Triangulation
12.30 Base of Triangulation
S. 85° 23' W. 26.38
Part of the INDIAN RESERVATION. A. 8.74/100
Reserved by Ex. order dated June 10 1882. for public purposes
Claim 78
James P. Pendell
$100.
Claim 84
$160.40
S. 64° 37' E. 2.21
S. 77° 10' E. 20.78
PORTAGE STREET
S. 77° 10' E.
STE MARIE CANAL

Copy of Diagram, being part of Defendant's Exhibit No. 21.

(Record, pages 567-571.)


N.W. ¼ of N.W. ¼ Section 6.
N.E. ¼ of N.W. ¼ Section 6.
Principal Meridian
Isd No. 2
Part of the Indian Reservation
A. 9.10 ¾100
N. 85° 23' E 18.89
S 77° 10' E 15.00
N. 77° 10' W. 3.63
S 89° E 9.17
N. 85° 23' E
S 00 Base Triangulation
1320 From Meridian
2640 From Meridian
Post

This map is based on certified copy of original Whetpley survey with additional lines showing land located by Wm B Cody with Porterfield warrants Nos. 114 and 124.

Scale 30 Inches to the Mile.

# In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, APPELLANT,
*v.*
THE CHANDLER-DUNBAR WATER POWER COMPANY.
No. 599.

**MOTION TO ADVANCE.**

This cause arises by suit brought by the United States in the United States Circuit Court for the Western District of Michigan, Northern Division, against the Chandler-Dunbar Water Power Company, to quiet title to two islands known as Islands Nos. 1 and 2, which are situated in the rapids of the Straits of St. Mary about 400 feet north of the American shore at Sault Ste. Marie, Mich., and south of the international boundary line between the United States and Canada. The Circuit Court dismissed the bill of the United States and the United States Circuit Court of Appeals for the Sixth Circuit affirmed the decree of the Circuit Court. By appeal from said Court of Appeals the controversy is brought before this court.

27509—08

The appellant, the United States, claims said islands as public lands in a state of reservation. The appellee claims them under a patent issued by the Land Department to one William Chandler on December 15, 1883, purporting to grant land situated on the south shore of the strait opposite said islands. The islands are not mentioned in said patent, but the claim of the appellee is that title to the shore land carries title to said islands as an incident of its alleged riparian ownership.

The principal questions involved are as follows:

I. Whether the principle of law established by this court in *Illinois Central R. R. Co.* v. *Illinois* (146 U. S., 387), as to the ownership of the bed of the Great Lakes, is applicable also to the bed of the communicating waterways connecting the Great Lakes, and therefore whether, as claimed by the appellant, the waters of the Straits of St. Mary are public navigable waters, the title to the bed of which, south of the international boundary, is in the State of Michigan, or whether, as claimed by the appellee, said title is in the owner of the adjacent shore and carries title also to unsurveyed islands opposite said shore.

II. Whether the character of the Straits of St. Mary, surrounding said islands, is established as public navigable waters, common to both nations, by treaties entered into between the United States and Great Britain, as well as by the law of nations, and therefore whether, as claimed by appellant, no riparian ownership attaches to the bed of said waters,

or to the islands existing therein, by virtue of ownership of the adjacent shore.

III. Whether, as claimed by the appellant, said islands, together with the tract of land on the opposite mainland included in said patent to Chandler, were prior to said patent and still are reserved from disposal by competent authority for public uses, viz, in connection with the construction of works in aid of commerce at that point, consisting of locks and a ship canal around the rapids, or whether, as claimed by appellee, said reservation, if lawfully established, has been lawfully released, and therefore whether said patent is or is not void.

IV. Whether said patent, even if valid as to said tract on the mainland, also carried title to the bed of the waters and to said islands therein, as claimed by appellee, or was limited to the water's edge by reason of the character of the survey thereof, as claimed by appellant, if said tract was ever surveyed.

V. Whether said tract on the mainland, so patented, was ever surveyed under the authority of the United States, as claimed by appellee.

VI. Whether, if said tract was never surveyed under authority of the United States, as claimed by appellant, the patent so granted by the United States under a location by Porterfield scrip was valid, as claimed by appellee, or void, as claimed by appellant, inasmuch as the act of Congress of April 11, 1860 (12 Statutes, 836), providing for the location of such scrip, confines its use to surveyed public lands

of the United States according to the usual legal subdivisions of such surveys.

VII. Whether the United States is estopped from bringing this suit; and whether the patent issued to said Chandler is not subject to attack in this suit by reason of a statute of limitations contained in the act of Congress approved March 3, 1891. (26 Statutes, 1099.)

The United States is about to add to its works in aid of commerce, above referred to, by the construction of another lock for use in connection with the two now existing and by widening the canal, and it is desirable that the status of land in the vicinity claimed by the United States be promptly determined.

Because of the general public interest in the case and the importance of the questions involved, the Solicitor-General, in accordance with rule 26, section 5, moves the court to advance this case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

The Solicitor-General has authority to say that the appellee concurs in such motion.

HENRY M. HOYT,
*Solicitor-General.*

FEBRUARY, 1908.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

## No. 599.

THE UNITED STATES, APPELLANT,

*v.*

THE CHANDLER-DUNBAR WATER POWER COMPANY, APPELLEE.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This cause arises by suit brought by the United States in the United States Circuit Court for the Western District of Michigan, Northern Division, against the Chandler-Dunbar Water Power Company, to quiet title to two islands known as Islands Nos. 1 and 2, which are situated in the rapids of the Straits of St. Mary about 400 feet north of the American shore at Sault Ste. Marie, Michigan, and south of the inter-

national boundary line between the United States and Canada. The Circuit Court dismissed the bill of the United States and the United States Circuit Court of Appeals for the Sixth Circuit affirmed the decree of the Circuit Court. By appeal from said Court of Appeals the controversy is brought before this court.

The appellant, the United States, claims said islands as public lands in a state of reservation for public uses. They are situated immediately north of the ship canal and locks around the St. Mary's Rapids, and the appellant contends that they lie in public navigable waters, to the bed of which no riparian ownership can attach, and that the continued undisturbed ownership and possession of said islands and the recognition of the public character of the waters surrounding them are essential to the present and future operation and enlargement of said works in aid of commerce. The appellant also contends that its international obligations to Great Britain, arising both from treaties and from the law of nations, require it to assert and maintain the public character of said waters and to deny the existence of any private ownership in the bed thereof.

The appellee claims said islands under a patent issued by the Land Department to one William Chandler on December 15, 1883, purporting to grant land situated on the south shore of the Strait of St. Mary opposite said islands. The islands are not mentioned in said patent, but the claim of the appellee is that title to the shore land carries title to said islands as a riparian incident of its alleged ownership of the shore. The appellee therefore denies the public character of said waters, and also denies that said islands are needed by

the United States for public purposes, and also denies that their ownership and possession and the maintenance of the public character of the waters surrounding them are essential to the performance of the international obligations of the United States.

The appellant claims that said islands, together with a quantity of land on the south shore of the Straits, on a part of which its ship canal and locks are constructed and in operation, have been reserved since the year 1822, and at any rate since April 3, 1847, or September 2, 1847, or August 5, 1852, for public purposes.

The appellee, while admitting such reservation in 1847, claims that said reservation has been released—

(*a*) By order of the President on December 9, 1852;

(*b*) By the abandonment of an Indian right of occupancy by a treaty proclaimed April 24, 1856;

(*c*) By the act of September 26, 1850, and the operations thereunder, such operations including the survey of a portion of the mainland at Sault Ste. Marie by Thomas Whelpley in 1854 and 1855.

The appellant alleges that the tract patented to Chandler was not included in the Whelpley survey and was never included in any other survey of the public lands, and that therefore the land was not subject to be taken by location with Porterfield scrip, which is the basis of the Chandler title, under the very terms of the act of Congress authorizing the use of such scrip, and that such scrip cannot be located upon land of the character covered by the Chandler patent.

The appellee alleges that this suit is not brought in good faith by the United States, but that its object, instead of being the assertion of the rights and duties

set out in complainant's bill, is to assist a private corporation, the Michigan-Lake Superior Power Company, to divert water from flowing past the land covered by defendant's alleged title.

The appellant insists that this suit is brought in good faith, for the objects and purposes set out in its bill.

The appellee also relies upon the statute of limitations of March 3, 1891, which provides that suits by the United States to vacate and annul any patent theretofore issued shall only be brought within five years from said date.

The appellant contends that the patent issued to Chandler in 1883 was not voidable, but absolutely void, because the land embraced therein, being in a state of reservation, was not subject to disposal under the public-land laws of the United States, and that a void title is not within the intent of said statute of limitations; and appellant contends, further, that said statute of limitations does not apply, because said title is also void for the reason that the land covered by said patent has never been subject to a location by Porterfield scrip.

The appellee also alleges that the appellant is estopped by its dealings with the appellee and by its laches to deny the title of appellee to the upland alleged to be embraced in the patent to appellee's grantor.

**Manner in which the Questions are Raised.**

The origin and course of this cause could be briefly stated, were it not for the attack by the appellee upon the good faith of the suit and of the officers of the United States by whom it has been conducted. Such attack makes necessary a somewhat detailed statement of the circumstances under which this suit was brought. The inception of the suit was as follows:

The Chandler-Dunbar Water Power Company, claiming ownership, as above stated, of said tract on the mainland and also claiming ownership, as incident thereto, of the bed of the strait and of said Islands 1 and 2, proceeded to utilize a portion of the water flowing past said tract for the development of electrical power. On June 13, 1902, another corporation, the Michigan-Lake Superior Power Company, having first obtained authority from the State of Michigan, (record, 595-597) was granted, by act of Congress (32 U. S. Stats. 361) the right to divert water from the St. Mary's River (or Strait) for water power purposes. on the condition that its operation should not injuriously affect navigation nor impair or diminish the water levels or any natural increase thereof, either in Lake Superior, or in the United States ship canal and locks, or the navigable channels, locks, or ship canals connected therewith, whether natural or artificial, then or thereafter existing, and on the further condition that said company should establish, maintain and operate suitable and sufficient remedial and controlling works in the rapids of said river under the direction

of the War Department, in order to maintain the water levels of Lake Superior and the natural and artificial channels connected therewith. It was provided that nothing in the act should prejudice the rights or remedies of the United States or of individuals for failure to maintain said water levels, or affect any existing riparian or other rights or remedies or any action at law or equity then pending.

32 U. S. Stats. 361-362.

A competitive situation and controversy thus existed between private interests, in which controversy the United States then had and now has no interest whatever.

Prior to the passage of said act the Chandler-Dunbar Company had sued the Michigan-Lake Superior Company in the State Circuit Court for the County of Chippewa, claiming ownership of the south shore of the strait at the place involved in this cause and also claiming ownership of the bed of the water extending from said shore northerly to the international boundary line (record, 578). About September 1, 1902, (record, 636) the latter company filed its answer (record, 582-635) setting up, among other defenses, a denial of title in the Chandler-Dunbar Company to the bed of the strait and to any islands therein.

Meanwhile on July 10, 1902, (record, 192) the Chandler-Dunbar Company attempted to obtain from the government of the United States recognition of its alleged title to Islands One and Two, but was met by the objection that said islands had been reserved by order of the President on October 12, 1889, for public uses

(record, 195). The matter was submitted by the War Department to the Secretary of the Interior and by the Secretary to the Commissioner of the General Land Office, accompanied by a brief prepared by John H. Goff, Esq., as attorney for the Chandler-Dunbar Company, in which he urged the riparian right of said company in the bed of the strait and also contended that said reservation by the President was ineffective. The United States therefore, while having no interest whatever in the controversy between the rival power companies, was drawn into the situation because of the attack upon its own rights in the vicinity of the controversy by one of the contending parties.

On September 4, 1902, the Commissioner of the General Land Office, after consideration of the questions involved, reported to the Secretary of the Interior as follows:

"I, therefore, respectfully submit that the question of ownership of said islands Nos. 1 and 2, is a judicial rather than an executive one, and should be determined by the proper court."

Record, 195.

At that time other matters were also pending before the Department of the Interior, involving the right of the Department, under the public land laws, to issue patent to individuals for other islands, not at the place now in controversy but at other places in the same strait between Lake Superior and Lake Huron (record, 256).

After receiving the recommendation from the Commissioner of the General Land Office, quoted above, the

Secretary of the Interior gave consideration to the whole subject and, on January 21, 1903, wrote to the Attorney General, stating that the view of the Interior Department had been that such islands did not pass by grant of the adjacent shore lands, that several of them had been reserved by the President, for public uses in connection with the improvement of navigation, after grant by the United States of the adjacent riparian lands, that upon such reserved islands the Government had made and would make in the future great expenditures in such channel improvement, so that the general question of ownership of islands so situated in the connecting waters of the Great Lakes is one of much concern to the Government and ought, if possible, to be determined. He also stated that since the reservation of said islands by the President doubt had been raised as to the correctness of such view by the decision of this court in Grand Rapids & Indiana R. R. Company *vs.* Butler (159 U. S. 87), which related to an island in an inland navigable stream and not in the waters connecting the Great Lakes. He further stated that inasmuch as any departmental action in cases involving islands situated in the connecting waters of the Great Lakes would not be finally determinative as to the title thereof, the existing situation presented an opportunity to settle that question, and that it is to the interest of the Government that it should be adjudged that title to such islands does not pass from the United States by grant of the shore lands. Thereupon, enclosing various papers relating to the question of the waters, the islands, the reservation and the Sault Ste. Marie ship canal, he concluded as follows:

"In view of this Department, an action ought to be instituted on behalf of the United States to quiet the title against the Chandler-Dunbar Company to establish the ownership of said islands one and two at the Sault Ste. Marie.

"This department, therefore, requests that such action be instituted, if, in the judgment of your department such action is maintainable, and such is the proper course to protect the interests of the United States."

Record, 255-257.

On February 2, 1903, the Attorney General wrote to the United States Attorney for the Western District of Michigan, enclosing a copy of said letter of the Secretary of the Interior and other papers bearing upon the question, and advising him that, because of the importance of the case to the Government, special counsel, of experience in the particular questions involved, had been appointed to assist him in the preparation and trial of the case, and directing him that, after careful examination by himself and the special counsel of the matters involved and the proper course to pursue, they should report their conclusions to the Department of Justice and await further instructions.

Record, 683-685.

The claim of the Chandler-Dunbar Company, which said company had asserted before the War Department and the Department of the Interior, that the President's order reserving Islands 1 and 2 was without legal effect, required an exhaustive investigation in the public archives, in the course of which the De-

partment of Justice became convinced that said company had no title either to the islands or to the land on the shore included in the Chandler patent, but that both the islands and the shore are in a state of reservation for public uses, (record, 54). While such investigation was proceeding a bill which, by inadvertence in the office of the United States Attorney in Michigan, had been prepared and filed without submission to the Attorney General, but not served, was withdrawn by order of the Department of Justice, (record, 685-688). With the approval (record, 56) of the Department of the Interior, which had originally requested the institution of suit, the present bill to quiet title to said islands was filed, alleging not only the public character of the waters and the lack of riparian ownership in the bed thereof, but also the absence in the defendant of any shore title to which riparian incidents could attach even in private waters.

The Circuit Court refused to consider any allegations or evidence to show the invalidity of appellee's shore title, thus eliminating from the case all evidence offered to negative the defendant appellee's assertion of ownership to the shore, upon which its alleged ownership of the islands necessarily depends (Memorandum Opinion of District Judge, record, 45), and having so refused to consider appellant's testimony, proceeded to deal with the case as if the title of defendant appellee to the shore had already been established (Memorandum Opinion, record, 47) and to apply to such shore title rules of riparian law which appellant contends are only applicable to inland waters of the State of Michigan and not applicable to the

waters of the Great Lakes or to the connecting waterways between the Great Lakes which form a necessary part of their system of navigation.

See assignment of errors below, (record, 69-72).

Appeal was thereupon taken to the Circuit Court of Appeals, which considered all the questions involved and decided adversely to the contention of the United States. Appeal was then taken to this Court, whereby the following questions are raised.

**The Questions Involved.**

I. Whether the principle of law established by this court in *Illinois Central R. R. Co. v. Illinois* (146 U. S., 387), as to the ownership of the bed of the Great Lakes, is applicable also to the bed of the communicating waterways connecting the Great Lakes, and therefore whether, as claimed by the appellant, the waters of the Straits of St. Mary are public navigable waters, the title to the bed of which, south of the international boundary, is in the State of Michigan, or whether, as claimed by the appellee, said title is in the owner of the adjacent shore and carries title also to unsurveyed islands opposite said shore.

II. Whether the character of the Straits of St. Mary, surrounding said islands, is established as public navigable waters, common to both nations, by treaties entered into between the United States and Great Britain, as well as by the law of nations, and therefore whether, as claimed by appellant, no riparian ownership attaches to the bed of said waters, or to the islands

existing therein, by virtue of ownership of the adjacent shore.

III. Whether, as claimed by the appellant, said islands, together with the tract of land on the opposite mainland included in said patent to Chandler, were prior to said patent and still are reserved from disposal by competent authority for public uses, viz, in connection with the construction of works in aid of commerce at that point, consisting of locks and a ship canal around the rapids, or whether, as claimed by appellee, said reservation, if lawfully established, has been lawfully released, and therefore whether said patent is or is not void.

IV. Whether said patent, even if valid as to said tract on the mainland, also carried title to the bed of the waters and to said islands therein, as claimed by appellee, or was limited to the water's edge by reason of the character of the survey thereof, as claimed by appellant, if said tract was ever surveyed.

V. Whether said tract on the mainland, so patented, was ever surveyed under the authority of the United States, as claimed by appellee.

VI. Whether, if said tract was never surveyed under authority of the United States, as claimed by appellant, the patent so granted by the United States under a location by Porterfield scrip was valid, as claimed by appellee, or void, as claimed by appellant, inasmuch as the act of Congress of April 11, 1860 (12 Statutes, 836), providing for the location of such scrip, confines its use to surveyed public lands of the United States according to the usual legal subdivisions of such surveys, and

ether such scrip can legally be located upon lands of character covered by the Chandler patent.

VII. Whether, as alleged by appellee, the object this suit is not to further or protect any interest of United States or to protect any of its property or fulfill its obligations to the public or to avoid embarssment in its international relations with Great itain, but is to assist a private corporation known as Michigan-Lake Superior Power Company in an atmpt to divert water from the upland alleged to belong appellee.

VIII. Whether the United States is estopped from inging this suit.

IX. Whether patent issued to the appellee's grantor not subject to attack in this suit by reason of a atute of limitations contained in the act of Congress proved March 3, 1891. (26 Stats., 1099.)

## SPECIFICATION OF ERRORS.

1. In affirming the decree of the Circuit Court for e Western District of Michigan, Northern Division, smissing the bill of complaint herein.

2. In not reversing the decree of the Circuit Court nd granting the relief prayed for by the bill of comaint herein.

3. In not holding that the United States is the owner, y cession from the State of Virginia, of Islands One nd Two, described in the bill of complaint herein.

4. In holding that the waters, viz: the Strait of St. lary, in which lie said Islands One and Two, are sub-

ject to the rule of law as to riparian rights which prevails in Michigan as to inland rivers in that state, and that the bed of said waters belongs to the appellee as owner of the adjacent shore to the thread of the stream. including said islands therein.

5. In not holding that the waters in which lie said Islands One and Two are public navigable waters, and that the same doctrine as to the dominion and sovereignty over and ownership of lands under said waters applies which obtains as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes and which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea; and that the lands under the waters of the Strait of St. Mary, connecting Lake Superior and Lake Huron, are held by the same right as lands under the navigable waters of the Great Lakes and lands under tide waters on the borders of the sea and are subject to the same trusts and limitations, and that no title to said Islands One and Two exists in the appellee by virtue of any alleged ownership by the appellee of the shore opposite said islands.

6. In holding that the United States bases its title to said Islands One and Two upon "the necessity imposed by the provision of the Constitution delegating to the United States the power to regulate commerce between the States and between the States and foreign countries," instead of solely upon its right as proprietor of said land by cession from the State of Virginia.

7. In holding that the United States has neither the legal nor the equitable title in said Islands One and Two.

8. In holding that the title to said Islands One and Two is in the State of Michigan if the State has not yielded it to the riparian owner.

9. In holding, in effect, that said Islands One and Two were unclaimed by the United States at the date of the admission of the State of Michigan into the Union and that, being situated in "submerging waters," although conceded not to be themselves submerged, the title thereto is of the same character with that of the bed of the waters surrounding them; instead of holding that the bed of said waters belongs to the State of Michigan by virtue of the sovereignty of said State and that said islands belong to the United States by virtue of the proprietorship thereof by the United States.

10. In holding that the United States has recognized the right of the new states, including the State of Michigan, to make such disposition as the State pleased of such submerged lands and "unclaimed islands" (meaning unsurveyed islands) in waters forming an international boundary and constituting an essential part of the system of the Great Lakes; and in holding, in effect, that such recognition has been given to such alleged right of the State of Michigan so far as said Islands One and Two and the bed of the waters surrounding them are concerned.

11. In holding that the State of Michigan has, in manner aforesaid, acquired title to said Islands One

and Two and to the bed of the waters surrounding them and has relinquished them to the riparian owner.

12. In holding that there is no substantial ground for a distinction between the inland waters of the State of Michigan and those waters on its borders which constitute an international boundary.

13. In not holding that the water surrounding said Islands One and Two is, in legal effect, a strait and not a river, and therefore not susceptible of private ownership of the bed thereof, nor of private ownership of the islands situated therein, merely by virtue of riparian right claimed by the owner of the adjacent shore.

14. In not holding that the character of the Strait of St. Mary, surrounding said Islands One and Two, is established as public navigable waters, common to both nations, by treaties entered into between the United States and Great Britain, viz: by the Treaty of Paris, signed November 30, 1782; by the Treaty of Paris, signed September 3, 1783; by the Treaty of Ghent, signed December 24, 1814; and by the Treaty of Washington, signed August 9, 1842; and that therefore no riparian ownership attaches to the bed of said waters, or to the islands existing therein, by virtue of ownership of the adjacent shore.

15. In not holding that the character of the Strait of St. Mary, surrounding said Islands One and Two, is established as public navigable waters, common to Great Britain and the United States, by the law of nations, and that therefore no riparian ownership attaches to the bed of said waters, or to the islands existing therein, by virtue of alleged ownership of the adjacent shore.

16. In not holding affirmatively that the patent issued to William Chandler, the appellee's alleged grantor, for a tract of land on the shore opposite said Islands One and Two, under which the appellee claims said islands by virtue of riparian right, does not mention, nor by the specific terms thereof include, said islands.

17. In not holding that said tract of land on the shore opposite said Islands One and Two was, at the dates of its location by, and of the patent issued therefor to, said William Chandler, and still is, reserved by competent authority for public uses, and was not then, and is not now, subject to disposal under the public land laws of the United States.

18. In not holding that said tract of land, with other lands, had been, at the dates of the location thereof by, and of the patent therefor to, said Chandler, four times reserved for public uses by competent authority of the United States from sale or other disposal, viz: in 1822, by the reservation established by General Brady under the direction of the military authorities; on April 3, 1847, by the temporary reservation by the President; on September 2, 1847, by the specific reservation by the President; and on August 5, 1852, by the specific and final reservation designated by the Secretary of War under the act for the settlement of titles at Sault Ste. Marie, approved September 26, 1850.

19. In not holding that, while said successive reservations each reduced the area of the lands previously reserved, said latest reservation became operative on August 5, 1852, under the provisions of said Act of Congress approved September 26, 1850, and that said

reservation is still in full force and effect and that it wholly includes within its boundaries the said tract subsequently located by said Chandler with Porterfield scrip in 1881 and patented to him in 1883.

20. In not holding that by reason of said tract being so reserved at the dates of the location by and patent to said Chandler, said location and patent were without authority of law and are not merely voidable but void.

21. In holding that the President's order of December 9, 1852, releasing certain lands from temporary reservation, operated to release from reservation the smaller area of lands, including the tract since located by and patented to said Chandler, which had been included in said temporary reservation and which had also, at the date of said order, been included in the final designation and reservation of August 5, 1852.

22. In holding that, at the date of said President's order of December 9, 1852, there had been no absolute reservation of the land so patented to said Chandler but "only a temporary reservation of it which operated only as a temporary suspension of sales by order of the President, for his own convenience, until he should be prepared to make the reservations intended by Congress."

23. In not holding that said final designation and reservation of August 5, 1852, did and does constitute the reservation intended and contemplated by Congress, by its Acts approved March 1, 1847, and September 26, 1850, and that said reservation includes said tract patented to said Chandler.

24. In holding that the purpose of the suspension had been accomplished more than thirty years before the issue of said patent to Chandler.

25. In misapprehending the record of official action relating to the several successive reservations for public uses and confusing it with the record of official action relating to the military post of Fort Brady, lying to the east of the land embraced in said final designation of August 5, 1852, and in holding, by reason of such mistake, that the letter of the Commissioner of the General Land Office dated April 30, 1852, related to the boundaries of the post of Fort Brady when it in fact related to the temporary reservation of April 3, 1847; and in holding by reason of such mistake that Colonel Abert had reported prior to December 9, 1852, that no lands west of said post of Fort Brady were required; and in holding by reason of such mistake that said order of December 9, 1852, released all the land previously reserved except that embraced within the limits of said military post; and in holding that the Land Department has ever since followed that interpretation.

26. In misapprehending the record of official action relating to the temporary reservation of April 3, 1847, and confusing it with the record of official action relating to the specific reservation of September 2, 1847, and the final reservation of August 5, 1852, and in holding by reason of such mistake that official action leading up to and consummating the order of release of December 9, 1852, applied to said specific and final reservations as well as to the larger quantity of land embraced in said temporary reservation, and in hold-

ing that by the exception in said order of release only the reservation for said military post was intended and not the reservation for public uses.

27. In not holding that the designation, by the military authorities, as a place of encampment for the Chippewa Indians under the treaty of June 16, 1820, with said Indians, of the land shown on the township plat of the public land survey of 1845 as "Indian Reserve," including said tract subsequently patented to Chandler, established in said Indians a mere easement or right of user and did not preclude the subsequent reservation for public uses of a larger tract including the title to the soil embraced in said land encumbered by said right of user.

28. In holding that no reservation was made nor could there be so long as the reservation for the Indians continued, without a breach of said treaty.

29. In not holding that, even if the existence of said Indian right of user precluded, during its existence, the reservation for public uses of the title to the soil embraced therein, the operation of such reservation, and especially of the final reservation of August 5, 1852, designated under authority of the Act of Congress approved September 26, 1850, was merely postponed until after the extinguishment of said Indian right of user by their voluntary cession to the government under the treaty of August 2, 1855, and that since said cession said reservation has continued to be and is in full force and effect.

30. In holding that Congress did not intend by the Act of 1847 that it should have any application to the Indian Reserve.

31. In holding that there is nothing whatever in the record to show that the President pretended to have any authority over the lands in the Indian Reserve, and that he had no authority to deal with the Indian Reserve except to preserve its integrity.

32. In holding that the Act of Congress approved August 26, 1852, granted to the State of Michigan, for the purpose of building the ship canal, a strip of land four hundred feet wide through the military reservation at the Falls of St. Mary's River; instead of holding that said Act granted merely the use of said strip, constituting an easement therein.

33. In not holding that the military reservation mentioned in said Act of August 26, 1852, was the reservation established for public uses by the final designation of August 5, 1852, and that said Act was a legislative recognition of the existence and validity thereof, as established by authority of the prior Act of September 26, 1850.

34. In not holding that said tract of land on the shore opposite said Islands One and Two, at the date of its location by, and of the patent issued therefor to, said William Chandler, had not been, and has never been, surveyed under authority of the United States according to the usual legal subdivisions of the public surveys, and therefore was not subject to such location by Porterfield Scrip, under the terms of the Act of Congress approved April 11, 1860, authorizing said scrip to be issued and located.

35. In holding, while conceding that there has never been any survey of said land upon lines of sections and

subdivisions, that said tract "was open to the location of said scrip and had been adequately surveyed, that the location of the scrip was permissible and that the patent was and is valid."

36. In holding that the statute of limitation of March 3, 1891 (26 U. S. Statutes, 1093), is applicable to this case and that the lapse of five years from the date of said Act resulted in the confirmation of the title under the patent which had been issued to said Chandler.

37. In holding that said statute of limitation relates to "grants of title which the patents purport to make and which the United States had lawful right to make"; instead of to grants of title which the patents purport to make and which the land officers of the United States had authority to make.

38. In holding that the appellee held adverse possession for five years after the passage of said Act of March 3, 1891, and that said lapse of time was sufficient under said statute without adverse possession.

39. In holding that the elements of equity in the attack on the Chandler patent are scant.

## ARGUMENT.

## I.

## THE LAW OF THE WATERS.

### A.

### Locus of the Islands.

The islands in question lie in the waters which connect Lake Superior with Lake Huron and form a part of the great system of inland seas known as the "Great Lakes." The waters of Lake Superior at its eastern end narrow into the waters of White Fish Bay, then into the still smaller Waiska Bay and then into the still smaller Mosquito Bay. At the eastern extremity of Mosquito Bay the waters narrow still further into what is designated on the official plat of the public-land surveys as the "Straits of St. Mary."

> See map of Township 47 North, Range 1 West, in Complainant's Exhibit 3 (Bound volume of township maps of public surveys, forwarded from the Court of Appeals and filed with the clerk, for reference).

Thence the waters seek the lower level of Lake Huron through the narrow passage sometimes known as the "St. Marys River," and sometimes as the "Strait of St. Mary," at the head of which are situated the rapids known as the "Sault Ste. Marie."

About two miles below the rapids the waters widen

into a bay, forming the northernmost part and head of Lake Huron. In this bay are scattered many islands, large and small, some of them so large as to stretch nearly across it and others so small as barely to part the waters. Around and between these islands the waters of Lake Superior pursue their course toward the sea, affording many navigable channels and passageways to the enormous national and international commerce that is carried thereon. Many of these passageways are so large as to acquire the distinction of separate names, such as Lake George, Little Lake George, Hay Lake, Hay Lake Channel, Mud Lake, Little Mud Lake, Echo Bay, Wasig Bay, Shingle Bay, Maskinonge Bay, Munuscong Bay, Bear Lake, St. Joseph Channel, Worsley Bay, Tenby Bay, Raber Bay, Potagannissing Bay, Sturgeon Bay, Montreal Channel, North Channel, Detour Passage, Detour Channel, Strait of Mississauga, East Neebish Channel, Middle Neebish Channel, West Neebish Channel, and others.

See U. S. Engineer Survey of Northern and Northwestern Lakes, which may be used at any hearing in this case under stipulation in record, page 212.

None of these various passages, channels, lakes, and bays are in any proper sense of the word rivers, nor do they constitute a part of a single river. They very closely resemble the channels lying between the many islands of the Ægean Sea, through which the waters of the Euxine seek those of the Mediterranean. Take the islands out of the Ægean Sea and it would still be the Ægean Sea. Put them all into the Adriatic Sea,

so thickly even as to leave scant navigable passage between, and the water would still be the Adriatic Sea.

Take out of the map only four of the islands between Lake Superior and Lake Huron, viz: Sugar Island, Neebish Island, St. Joseph Island, and Drummond Island, and the waters are, to the most casual observer, a part of Lake Huron. Put them back, and many more with them, and the character of the water as a part of the lake is not altered.

The two islands here involved lie opposite the city of Sault Ste. Marie, immediately north of the ship canal constructed by grants and appropriations by the United States in aid of navigation and in the Rapids where the waters descend about eighteen feet in a distance of about a mile.

About six miles to the westward the waters narrow, at Point au Pins, to a width of half a mile, then widen to the width of about two miles and again narrow to the width of something over half a mile at the place in controversy. Thence easterly for three miles the width varies from a mile to something over half a mile to the point where the waters diverge into various channels divided by islands, which point may be properly regarded as the head of Lake Huron. But even this small portion of the connecting waters is not, properly speaking, a river. Its character is precisely the same as that of the Bosphorus, which connects, by a narrow channel, the Black Sea with the Sea of Marmora, and which, we are told, "*resembles* a magnificent river more than an arm of the sea."

Imperial Reference Library, title "Bosphorus."

The Bosphorus has a current which is "sufficiently baffling to the unskilled Orientals."

*Ibid.*

But the Bosphorus is universally known as a "strait" and not as a river. So also the waters above described between Superior and Huron are in fact a strait and not a river. And, being so in fact, they are also so in law.

A strait is defined as

"A narrow passage of water connecting two bodies of water."

Century Dictionary.

"A narrow passage of water connecting two larger bodies of water."

Standard Dictionary.

"A (comparatively) narrow passageway connecting two large bodies of water—often in the plural as * * * the strait or straits of Mackinaw."

Webster's Dictionary.

"Narrow passes which connect larger bodies of water receive many designations. Among these, *sound* is used to designate some, but far more are called *strait*. The three terms *strait*, *channel* and *sound*, are interchangeably used to designate such passes. Besides these, in many places, the word passage is used * * * A sound or a channel is supposed to be larger than a strait or passage, but such is not always the case."

Hamersly's Naval Encyclopedia, title "Sound."

The waters in which these islands lie sustain the same relation to Lakes Superior and Huron that the

"Straits of Mackinaw" bear to Lakes Michigan and Huron and afford the same means of navigable communication that the Detroit River does between Lakes Huron and Erie. The City of Detroit was named from the water upon which it lies and the water itself was named by the original French discoverers in their own language Détroit, which is nothing more nor less than the French word for "strait" or "sound."

Moreover, the so-called St. Marys River, whatever its extent, has not been universally so entitled, but the words "strait" and "straits" have been, with equal or greater authority, applied thereto. In T. 47 N., R. 1 E., in which the islands in question are situated, the official plat designates the water as "St. Marys River."

Complainant's Exhibit 3. (Bound volume in clerk's office.)

But in the field notes of the official survey, from which said plat was made, appears a subdivision headed "Meanders of the Straits of St. Mary," and in such meander the waters are invariably referred to as "Straits."

Record, 115. The word "Bayou" on the top line is an error. It should be "Began."

In the said official field notes the meander line opposite the islands in question is run "along straits upstream."

Record, 121.

In the plat of the adjacent township to the eastward, 47 N., R. 2 E., the waters are designated as "Lake

George," and also in T. 46 N., R. 2 E., immediately to the south of the last-named township.

Complainant's Exhibit 3.

On the plat of T. 44 N., R. 2 E., the words "Straits of St. Mary" twice appear, as well as the designation "Munuskong Bay" and "Mud Lake."

Complainant's Exhibit 3.

In the official field notes of T. 45 N., R. 2 E., the surveyor includes a subdivision entitled "Meanders of Straits of Ste. Mary," such designation being applied to the narrow channel known as the "West Neebish."

Complainant's Exhibit 2, record, 77.

On the official plat of T. 48 N., R. 2 E., the waters are designated as "Little Lake George."

Complainant's Exhibit 3.

On the official plat of T. 42 N., R. 3 E., the waters are designated as "Straits of St. Marie."

Complainant's Exhibit 3.

On the official plat of T. 43 N., R. 3 E., the waters are designated as "Straits of St. Mary" and "Munuskong Bay."

Complainant's Exhibit 3.

On the official plat of T. 42 N., R. 4 E., the waters are designated as "Straits of St. Mary."

Complainant's Exhibit 3.

On the official plat of T. 41 N., R. 4 E., the waters at the point where they debouch into Lake Huron are designated as "Straits of Ste. Marie," and on the official plat of T. 42 N., R. 5 E., to the northeast of said township, they are designated as "Lake Huron."

Complainant's Exhibit 3.

For other designations of the waters between Lake Huron and Lake Superior see the lake-survey charts by the Engineer Department of the United States, referred to on page 212 of the record and offered in argument.

The public surveys referred to were made in the year 1845 and the waterways connecting Lakes Superior and Huron seem to have been commonly designated at that time and before as "straits" and not as a "river." On page 19 of a public discourse on the anniversary of the Historical Society of Michigan on June 4, 1830, by Henry R. Schoolcraft, he said:

"The Chippewas, whom it is my intention very shortly to notice, extended themselves northwardly, *from the Straits of St. Mary to Lake Superior,* and westwardly from that lake to the Mississippi."

Mr. Schoolcraft was at that time living at Sault Ste. Marie and was at the same time preparing the history of the Indians of North America which was published by authority of the United States Government.

In his monumental work entitled "Archives of Aboriginal knowledge," Schoolcraft places the habitat of certain bands of Chippewa Indians at the "*Straits* of St. Mary."

Vol. 1, pages 458, 459, 460, 461.

The communicating waterway between Lakes Superior and Huron is designated by Schoolcraft as "*Straits* of St. Mary" and not as the St. Mary's River.

*Id.*, vol. 6, pages 463, 464.

See also Schoolcraft's mention of the treaty of 1783 with England (later carried into the treaty of 1814) as one which "ran the boundary line *through the Straits of St. Mary's* and Lake Superior to the Lake of the Woods."

Personal Memories of a Residence of Thirty Years with the Indian Tribes, page 116.

Nor does the degree of navigability of such communicating waterways affect their character as a strait. For, we find that the "Strait of Belle Isle is the most northern of the two channels which connect the Gulf of St. Lawrence with the Atlantic Ocean, which separates Labrador from New Foundland and is about twelve miles wide. The navigation of this strait is reputed to be unsafe."

Lippincott's Pronouncing Gazetteer of the World.

"The Saint Mary's River is the body of water which connects Lake Superior with Lake Huron. It is the only outlet which the waters of the former have. The southeast corner of Lake Superior is nearly land locked, and is called by some Taquamenon Bay, and by others White Fish Bay. I prefer the latter name, and will therefore use it.

"The head of the Saint Mary's River is at Point Iroquois, near the southeast corner of White Fish Bay,

and the foot of that portion of it which is at present navigated by the commerce of the United States is at Point Detour, at the head of Lake Huron. **The body of water called the Saint Mary's River is really not a river, but a strait.** It is composed of a number of lakes whose waters are connected by narrower and tortuous streams. These lakes and streams are separated by and contain within their limits numerous islands of greater or less area. The fall of this river, *or strait*, from Lake Superior to Lake Huron is about 20.4 feet, and occurs in the first 50 miles, measured along the channel at present navigated mainly by the vessels of the United States, and which I will call the American channel. One-tenth of a foot of this fall occurs between the head of the river and the Falls of Saint Mary, a distance of 15 miles; 18 feet at the falls, or rapids, and the other 2.3 feet between these and the head of Mud Lake, about 35 miles below. The greatest single fall on this latter portion occurs at the East Neebish, which are the rapids at the foot of Lake George."

Report of Chief of Engineers to Secretary of War, Vol. II, part 3, 1882, page 2358.

The appellee claims that the water in which lie islands 1 and 2 is a river and subject to the rule established by the Supreme Court in Grand Rapids and Indiana Railroad Company *vs.* Butler (159 U. S., 87). But the appellant urges that the case cited related to *inland* navigable waters of the State of Michigan, viz., Grand River; that it has no application to waters forming a part of that great body of navigable waters, carrying both domestic and foreign commerce, known as the "Great Lakes," and forming the only communication between them; that it is evident that the water surrounding these islands was not and is not

a river, that it has not been uniformly so designated, and that, however designated, the name applied to it can not alter its essential character, which is that of a strait or sound.

It is true that this connecting waterway has frequently been designated as a river and that such designation has included its entire course, from Point Iroquois where it is four miles wide, on the west, to Point Detour, on the east, where one of its debouching channels passes into the uninterrupted expanse of Lake Huron. A recent Act of Congress authorizes the Secretary of Commerce and Labor to prescribe rules and regulations "governing the movements and anchorage of vessels and rafts *in St. Mary's River* from Point Iroquois on Lake Superior to Point Detour on Lake Huron."

Act of April 26, 1906, 34 U. S. Stats., 136.

But such designation does not establish the character of said waters as a river. The Supreme Court of Michigan has held that an island situated in said waters, northwest of Point Detour, is actually in Lake Huron.

Sherwood *vs.* Commissioner of State Land Office, 113 Michigan, 227.

In a case arising in a similar connecting waterway of the Great Lakes, which is uniformly known as Detroit *River,* this court held that the waters of that so-called river are in fact high seas and said:

"Seas in fact do not cease to be such, and become lakes, because by local custom they may be so called."

United States *vs.* Rodgers, 150 U. S., 266.

## B.

### The Status of the Waters Established by Treaties.

The public character of the water communication between Lakes Huron and Superior as that of a strait or sound, forming a part of the great bodies of water carrying the national and international commerce of Great Britain and the United States, known as the Great Lakes, is established by the treaties between those two countries.

### (1) The Treaties of Peace (Paris).

At the close of the War of the Revolution provisional articles of peace were signed at Paris on November 30, 1782, Articles I and II of which provided as follows:

"ARTICLE I. * * * That all disputes which might arise in future, on the subject of the boundaries of the said United States, may be prevented, it is hereby agreed and declared, that the following are, and shall be their boundaries, viz:

"ARTICLE II. From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of St. Croix river to the Highlands; along the Highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic ocean, to the northwesternmost head of Connecticut river. thence down along the middle of that river, to the forty-fifth degree of north latitude; from thence, by a line due west on said latitude, untill it strikes the river Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario, through the middle of said lake untill

it strikes the communication by water between that lake and lake Erie; thence along the middle of said communication into lake Erie, through the middle of said lake untill it arrives at the water communication between that lake and lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and lake Superior; thence through lake Superior northward of the isles Royal and Phelippeaux, to the Long Lake;" and thence westward.

8 U. S. Stats., 55.

The same boundary, in the same language, was established by Article II of the definitive treaty of peace, signed at Paris on September 3, 1783.

8 U. S. Stats. 81.

**(2) The Treaty of Ghent.**

Nothing further appears to have been done toward defining the boundary through the Great Lakes until after the War of 1812, which was terminated by the treaty of Ghent on December 24, 1814, by Article VI of which it was provided that:

"Whereas, by the former treaty of peace that portion of the boundary of the United States from the point where the forty-fifth degree of north latitude strikes the river Iroquois or Cataraquy to the lake Superior, was declared to be 'along the middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and lake Erie, thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water communication into

the lake Huron, thence through the middle of said lake *to* the water communication between that lake and lake Superior.' And whereas doubts have arisen what was the middle of the said river, lakes and water communications, and whether certain islands lying in the same were within the dominions of his Britannic majesty or of the United States: In order, therefore, finally to decide these doubts, they shall be referred to two commissioners, to be appointed, sworn, and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding article, unless otherwise specified in this present article. The said commissioners shall meet, in the first instance, at Albany, in the State of New York, and shall have power to adjourn to such other place or places as they shall think fit: The said commissioners shall, by a report or declaration, under their hands and seals, designate the boundary through the said river, lakes, and water communications, and decide to which of the two contracting parties the several islands lying within the said rivers, lakes, and water communications, do respectively belong, in conformity with the true intent of the said treaty of one thousand seven hundred and eighty-three."

8 U. S. Stats., 221.

By Article VII of said treaty it was further provided as follows:

"It is further agreed that the said two last-mentioned commissioners, after they shall have executed the duties assigned to them in the preceding article, shall be, and they are hereby authorized, upon their oaths impartially to fix and determine, according to the true intent of the said treaty of peace, of one thousand seven hundred and eighty-three, that part of the

boundary between the dominions of the two powers, which extends from the water communication between lake Huron, and lake Superior, to the most northwestern point of the lake of the Woods, to decide to which of the two parties the several islands lying in the lakes, water communications, and rivers, forming the said boundary, do respectively belong, in conformity with the true intent of the said treaty of peace, of one thousand seven hundred and eighty-three; and to cause such parts of the said boundary, as require it, to be surveyed and marked."

8 U. S. Stats., 221-222.

On May 23, 1817, the Commissioners met at St. Regis and proceeded to organize.

Moore, International Arbitrations, Vol. 1, 164.

From that time until June 18, 1822, they prosecuted their labors, with the assistance of surveyors employed by them.

The reports, dated December 12 and December 24, 1827, by the American and British Commissioners to their respective governments under the seventh article of the treaty of Ghent, with annexed documents, printed as House of Representatives Executive Document No. 451, 25th Congress, 2d session, constitute complainant's exhibit 4 of the record.

Offered, (record, 78.) Not transcribed as a part of the record, but reference is made thereto as a public document under authority of Jones *vs.* United States, 137 U. S., 202.

Copies of the maps accompanying the report of the

Commissioners form Complainant's Exhibit 5 of the record.

Record, 78, and bound volume of maps, forwarded from the Court of Appeals and filed with the clerk, for reference. Copies of said maps, somewhat lacking in detail, are also found in volume 6 of Moore's International Arbitrations. (Government Printing Office, 1898.)

(*a*) *Boundary Established under Article VI.*

It will be observed that the duty of the Commissioners in running the boundary line under the treaty of Ghent was divided into two parts. Under Article VI the boundary line was to be run to the water communication between Lake Huron and Lake Superior. Under Article VII the boundary line was to be continued westward from the water communication between Lake Huron and Lake Superior to the most north-western point of the Lake of the Woods.

The point where the boundary line under Article VI stopped and that under Article VII began was not fixed by the treaty but was left for determination by the surveys, report and decision of the commissioners. The actual point where, running westward, under the terms of Article VI, the line reached "the water communication between that lake (Huron) and Lake Superior" is the point where the waters flowing eastward in a single channel opposite the town of Sault Ste. Marie debouch into Lake Huron or, expressed differently, where the waters divide into two channels, one

running southerly west of St. George's Island and the other running around the north and east of St. George's Island. Such point is just two miles east of the islands here in controversy and properly marks the head of Lake Huron as hereinbefore shown. For a lake does not become a river by putting islands into it. This is in accordance with the view of the British Commissioner under the treaty of Ghent, who says, on page 96 of Ex. Doc. 451 (*supra*).

"Had it been convenient for the American interest to argue that the waters below the Sault de St. Marie, in which the disputed island of St. George is situated, actually constitute a part of Lake Huron, the claim could be argued with much better grace; for the river expands as soon as it reaches the island, it continues very broad until it arrives at the open waters of Lake Huron, and it would undoubtedly form a part, and a large part, of that lake, if the islands (which separate its channels) were removed."

Appendix, XII, Ex. Doc. 451, original page 96.

The argument referred to was not as to what constituted Lake Huron but what rule should govern the apportionment of islands on one side or the other of the middle of the Great Lake system.

That the point referred to, two miles east of Islands 1 and 2, was the proper point of division between the two parts of the boundary line run under articles VI and VII of the treaty is shown by the report of the American Commissioner, who says:

"The most obvious place for this division was at the Sault Ste. Marie, where the river is single and narrow, and the bisecting line would be short and determinate;

and that point would probably have been selected, but that the season closed upon the surveyors when they were some twenty miles short of it."

Complainant's Exhibit 4, Ex. Doc. 451, *supra;* Appendix, VI, original page 19.

A further reason for not running the line under Article VI westward, to the point mentioned, lay in the fact that the commissioners were unable to agree as to whether St. George's Island, which separates the two channels above mentioned, should be assigned territorially to Great Britain or to the United States, but as to this the American commissioner says:

"The undersigned would further add, that although the surveys of St. Tammany's and St. George's islands were not completed at the time of closing the 6th Article, and allotting St. Joseph's island to Great Britain, still he was possessed of very correct general information as to their locations and extent. He therefore could not for a moment permit himself to doubt but that, at the proper time and for the numerous reasons set forth in this report, they would both be assigned to the United States by the unhesitating award of the two commissioners."

Appendix, VI, Ex. Doc. 451, original page 19.
*Id.,* I, original page 3.

Nevertheless the commissioners did begin to run their line westward under Article VII of the treaty at the point mentioned.

Appendix, VII, VIII, XI, Ex. Doc. 451, original pages 44 and 70.

Such line was indicated by a series of maps prepared by the surveyors, and then on the files of the board.

Appendix, VIII, E... Doc. 451, original page 44.

On June 18, 1822, the commissioners rendered their decision under Article VI of the treaty, accompanied by maps. By reason of the circumstances above noted the line stopped at the head of St. Joseph's Island and at the foot of the Neebish Rapids instead of proceeding to the point at the head of St. George's Island. The line so established, so far as it relates to the communicating waterways between Lake Huron and Lake Superior, is as follows:

"Through the middle of Lake Huron, in a direction to enter the *strait* or *passage* between Drummond's Island on the west, and the little Manitou Island on the east; thence, through the middle of the *passage* which divides the two last-mentioned islands; thence, turning northerly and westerly around the eastern and northern shores of Drummond's Island, and proceeding in a direction to enter the *passage* between the Island of St. Joseph's and the American shore, passing to the north of the intermediate islands No. 61, 11, 10, 12, 9, 6, 4, and 2, and to the south of those numbered 15, 13, 5, and 1.

"Thence, up the said last-mentioned *passage*, keeping near to the island St. Joseph's and passing to the north and east of Isle a la Crosse, and of the small islands numbered 16, 17, 18, 19, and 20, and to the south and west of those numbered 21, 22, and 23, until it strikes a line (drawn on the map with black ink and shaded on one side of the point of intersection with blue and on the other with red,) passing across the river at the head of St. Joseph's Island, and at the foot of the

Neebish rapids, which line denotes the termination of the boundary directed to be run by the 6th article of the Treaty of Ghent."

8 U. S. Stats., 276.

Bound Maps, Complainant's Exhibit 5.

By the Commissioners' decision of June 18, 1822, which is in the nature of a concluded arbitration between the two nations under the treaty, and which therefore becomes a part of the treaty, and therefore the supreme law of the land (and which is published as such in the statutes of the United States), it is definitely established that Lake Huron extends northward at least as far as the line fixed by the Commissioners at the head of St. Joseph's Island.

It is therefore beyond question that the islands called Grand Manitou, Little Manitou or Cockburn, Drummond and St. Joseph's are situated in Lake Huron and that the soil under the waters surrounding all of said islands is a part of the bed of Lake Huron. It is also beyond question that the channels between said islands and between them and the smaller islands lying adjacent to and between any of said islands and the main shore, no matter how contracted such channels may be, are a part of the waters of Lake Huron and are not the waters of St. Marys River or of any other river, either in fact or in legal effect.

It will also be observed by referring to the decision of the Commissioners that the waters in the immediate vicinity of the islands in question are designated as "straits" or "passages" and not as rivers.

By reason of the same physical conditions the only two large islands remaining, viz: Neebish and St. George's, are also in Lake Huron.

The Supreme Court of Michigan has held that a small island lying north and west of Grand Manitou, Cockburn and Drummond Islands, which obstruct open navigation at the northern end of Lake Huron, is not in a river but in Lake Huron.

Sherwood *vs.* Commissioner of State Land Office, 113 Mich., 227.

If all the islands above referred to be eliminated from the map, it becomes entirely evident that the so-called St. Marys River consists of a "strait" or "passage," between the two Great Lakes.

Such strait, running westward from the point established by the Commissioners at the head of St. George's Island, is only three miles long if measured to the head of the rapids, is only three miles and a half long if measured to a point where the strait widens to a mile and three-quarters, is less than five miles long if measured to Old Vessel Point, where the strait again widens into a large expanse, a portion of which is known as Point aux Pins Bay, and is only nine miles long if measured to the lighthouse on Point aux Pins, where the strait widens into Mosquito Bay, immediately west of which is Waiska Bay, west of which lies Whitefish Bay.

(*b*) *Boundary Established under Article VII.*

The public and international character of the Great Lakes and their connecting waterways, constituting the international boundary between the two countries from St. Joseph's Island on the east to the Lake of the Woods on the west, is definitely established by the seventh article of the Webster-Ashburton treaty.

Although from said point, in St. Mary's River, one mile westward of Sugar Island and two miles east from the falls, westward to Lake Superior and through Lake Superior, the commissioners reached an agreement, under Article VII of the Treaty, except upon one question, said last-mentioned portion of the international boundary was not included in the commissioners' decision of June 18, 1822, and remained undecided until determined by Article II of the Webster-Ashburton treaty, signed at Washington on August 9, 1842.

8 U. S. Stats., 573.

Moore, International Arbitrations, vol. 1, 191.

Meanwhile the commissioners had been endeavoring to reach an adjustment of their disagreements, the points in controversy being the line from the head of St. Joseph's Island to the point at the head of St. George's Island and the line from a point near Isle Royale in Lake Superior to the Chaudière Falls in Lac La Pluie, which is situated between Lake Superior and the Lake of the Woods.

Moore, International Arbitrations, 173, 180.

Their controversies related, not to the public or private character of the waters, regarding which both were agreed that the waters should be maintained free and open to the citizens of both countries (Appendix, III, VIII, X, Ex. Doc. 451, original pages 8, 49 and 61), but as to what land or territory should be assigned to the respective nations. Their disagreement was hopeless and on December 12 and December 24, 1827, they so reported. A full history of their troubles is contained in Executive Document 451, above referred to.

In running their line the commissioners endeavored, by a fair method of adjustment and compromise, to assign to each nation its due proportion of said islands. It thus sometimes happened that the only navigable channel lay entirely within the territory of one of the high contracting parties. Notably was this true at what is known as the "Long Saut" and Barnhart's Island in the St. Lawrence River where the only navigable channels lay entirely within the State of New York.

Appendix, V, VIII, IX, X, Ex. Doc. 451, original pages 14, 49 and 61.

At the point of dispute regarding St. George's Island the most navigable channel for large vessels lay to the east and north of that island, although the shorter and practicable route for smaller vessels lay to the west thereof.

Appendix, IX, XII, Ex. Doc. 451, original pages 54, 99.

The British commissioner insisted that the line run through the west channel or passage, while the American commissioner insisted that the line should follow the most navigable passage, thus assigning the large and important St. George's (or Sugar) Island to the United States.

Appendix, VII, Ex. Doc. 451, original pages 43, 44.

The British commissioner endeavored to meet the difficulty arising from the main navigable channel at that point being entirely on the British side, if St. George's Island should be assigned to Great Britain, by proposing that said channel be declared free to the commerce of both nations provided the same stipulation should be simultaneously made by the American commissioner regarding the channel south of Barnhart's Island and of the two Long Sault Islands and to the channel, contiguous to the American main shore, which connects the River St. Clair with Lake St. Clair. This proposition was not accepted by the American commissioner, inasmuch as it involved the surrender of St. George's Island.

Appendix, VIII, IX, X, Ex. Doc. 451, original pages 49 and 61.

In the autumn of 1821, after the surveys and maps under the 6th article of the treaty had been completed but before any decisions had been made in regard to the course of the boundary, the American commissioner had submitted a proposition "that the two commissioners, in making their final award and description of

the boundary agreed on by them, should accompany it by, or rather incorporate into it, a joint declaration that they had assumed as one of the bases of their operations the principle that the navigation of all the lakes, rivers, and water communications through which, by the treaty of 1783, the boundary is to pass, *should continue,* AS BEFORE, *open and free to the citizens and subjects of the two Powers, unaffected by the course of the territorial or boundary line to be established by their award;* it being, however, understood that the proposition should be first submitted to, and receive the assent of, their respective Governments "

Appendix, IV, x, Ex. Doc. 451, original pages 8 and 61.

Upon submission to the respective Governments the proposition was acceded to by the President of the United States, but the British Minister declined, on the part of his Government, to give it his sanction *on the ground that as the waters involved were considered to be already free to the use of both Governments, by the law of nations,* it was superfluous that the commissioners should declare them to be so.

*Ibid.*

Moore, International Arbitrations, 166.

### (3) The Treaty of Washington (Webster-Ashburton Treaty).

So the matter lay until the summer of 1841, when Mr. Webster signified to Mr. Fox, the British Minister at Washington, that, having received the President's

authority for so doing, he was then willing to make an attempt to settle the boundary dispute, by agreeing on a conventional line, or a line by compromise. In December following the British Secretary of State for Foreign Affairs informed the American Minister at London that the Queen's government had determined to send Lord Ashburton as a special minister to the United States, with full powers to settle the boundary and all other questions in controversy between the two governments.

Writings and Speeches of Daniel Webster. Little, Brown & Co., 1903. Vol. 11, page 270.

Lord Ashburton arrived in Washington on April 4, 1842.

*Id.*, 272.

After having considered the vexed question of the boundary between Maine and New Brunswick, Lord Ashburton wrote to Mr. Webster on July 16, 1842, announcing a willingness to settle the disputed questions along the northern boundary and agreeing to concede the island of St. George to the United States.

*Id.*, 279.

Appendix XIII.

He attached a condition, however, that the proposed agreement should contain a clause, "which experience has proved to be necessary in the navigation of the great waters which bound the two countries," providing that the channels at the head of Lake St. Clair and

in the St. Lawrence above referred to, **which lie exclusively within the territorial jurisdiction of one or the other nation,** should be declared to be free and open public waters.

*Id.*, 281, 282.
Appendix xv.

To this Mr. Webster agreed, on July 27, 1842, suggesting further that the channel at the mouth of the Detroit River through British territory and the water communications and portages between Lake Superior and the Lake of the Woods should also be declared free and open.

*Id.*, 286, 287.
Appendix xviii, xx.

On July 29, 1842, Lord Ashburton replied to Mr. Webster suggesting that, as the line along the boundary which failed of being settled by the commissioners under the seventh article of the treaty of Ghent was already partially marked, it would be advisable to make the delineation on the charts prepared by those commissioners and avoid the expense of new commissioners and new surveys.

*Id.*, 288.
Appendix xxii.

Thereafter, after such further conference as the situation made necessary, the treaty was signed on August 9, 1842, Article II of which is as follows:

"It is moreover agreed, that, from the place where the joint commissioners terminated their labors under

the sixth article of the treaty of Ghent, to wit: at a point in the Neebish channel, near Muddy Lake, the line shall run into and along the ship channel between St. Joseph and St. Tammany islands, to the division of the channel at or near the head of St. Joseph's Island; thence, turning eastwardly and northwardly around the lower end of St. George's or Sugar island, and following the middle of the channel which divides St. George's from St. Joseph's island; thence up the east Neebish channel, nearest to St. George's island, through the middle of Lake George; thence, west of Jonas' island, into St. Mary's river, to a point in the middle of that river, about one mile above St. George's or Sugar island, so as to appropriate and assign the said island to the United States; thence, adopting the line traced on the maps by the commissioners, through the river St. Mary and Lake Superior, to a point north of Ile Royale, in said lake, one hundred yards to the north and east of Ile Chapeau, which last-mentioned island lies near the northeastern point of Ile Royale, where the line marked by the commissioners terminates; and from the last-mentioned point, southwesterly, through the middle of the sound between Ile Royale and the northwestern main land, to the mouth of Pigeon river, and up the said river, to and through the north and south Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence, along the water communication to Lake Saisaginaga, and through that lake; thence, to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake, and Lake Namecan, and through the several smaller lakes, straits, or streams, connecting the lakes here mentioned, to that point in Lac la Pluie, or Rainy Lake, at the Chaudière Falls, from which the commissioners traced the line to the most northwestern point of the

Lake of the Woods; thence, along the said line, to the said most northwestern point, being in latitude 49° 23′ 55″ north, and in longitude 95° 14′ 38″ west from the observatory at Greenwich; thence, according to existing treaties, due south to its intersection with the 49th parallel of north latitude, and along that parallel to the Rocky mountains. It being understood that *all the water-communications*, and all the usual portages along the line from Lake Superior to the Lake of the Woods; and also Grand Portage, from the shore of Lake Superior to the Pigeon river, as now actually used, *shall be free and open to the use of the citizens and subjects of both countries.*"*

8 U. S. Stats., 573.

It will be observed, on referring to that treaty, that the passages north of the line which terminated the commissioners' decision are designated as "channel," "Ship Channel," and "East Neebish Channel," until said point in St. Marys River is reached, said point being at the place where the waterway extending eastward and southward from Lake Superior ceases to be a single channel and begins to seek the waters of Lake Huron by various routes.

Said treaty thus recognizes the physical and geographical fact that Lake Huron extends northwesterly to a point about one mile east of the rapids at Sault Ste. Marie. Such construction places Sugar (St. George's) Island in a bay of Lake Huron, a determination which is geographically correct. Where the waters form a single channel and where the navigation is in-

* NOTE.—This punctuation differs from the print in 8 Stats. 573, but agrees with that in the original treaty in the Department of State.

terrupted by the rapids, which is the point at which the islands here in controversy are situated, the water communication is still properly to be styled a strait and not a river.

By this treaty the gaps in the international boundary line from the head of St. Joseph's Island to the head of St. George's (or Sugar) Island and from Isle Royale westward were filled by drawing a line covering those gaps on the places left vacant by the maps of the commissioners under the treaty of Ghent. The balance of the line under Article VII of that treaty was adopted as it had been established by said commissioners.

It is evident that while both governments regarded the waters of the Great Lakes and the waters between them as open and free to the citizens and subjects of the two Powers, *where they did not run through the territory assigned to either party*, yet where they did so run, all rights involved in that fact had theretofore been jealously asserted for the purpose of forcing advantage in the disposal of the islands in the common waters. It was this very deadlock which the conferences between Mr. Webster and Lord Ashburton, resulting in the treaty of 1842, were designed to remove, and did remove. For, in addition to the last sentence in Article II, the Webster-Ashburton treaty provided, in Article VII, as follows:

"It is further agreed, that the channels in the river St. Lawrence, on both sides of the Long Sault islands, and of Barnhart island; the channels in the river Detroit, on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores; and all the several channels and passages be-

tween the various islands lying near the junction of the river St. Clair with the lake of that name, *shall be equally free and open to the ships, vessels, and boats of both parties.*"

8 U. S. Stats. 575.

It is evident that in the conferences between Lord Ashburton's letter of July 29 and the signing of the treaty on August 9, 1842, Lord Ashburton and the Secretary of State became convinced that a declaration as to the free, open and public character of all the water communications along the line which was proposed to be run would be essential. For the last sentence in Article II is as follows:

"It being understood that all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods; and also Grand Portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

The above quotation differs in punctuation from the treaty as printed in 8 U. S. Stats. 574, but is in exact accord with the original treaty on file in the Department of State at Washington, with which it has been compared. As printed in the statutes the sentence is as follows:

"It being understood that all the water communications [*comma omitted*] and all the usual portages along the line from Lake Superior to the Lake of the Woods, [*comma should be semi-colon*] and also Grand portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

The sentence, so punctuated, would limit the declaration as to the public character of the waters to the line running northwesterly from Lake Superior to the Lake of the Woods and would not include the line from the head of St. Joseph's Island through the strait to the foot of Lake Superior and through Lake Superior to the mouth of the Pigeon River. It is inconceivable, in view of the fact that the two governments had been engaged since the treaty of Ghent in 1814 and were at that moment, in 1842, engaged, in the endeavor to establish the free, open and public character of the Great Lakes *and their communicating waters*, that the treaty resulting from their present efforts should leave unestablished a portion of the water boundary separating the two nations, and especially so as such omission would include the entire water boundary through one of the Great Lakes, viz: Lake Superior.

We contend that said efforts were consummated in the treaty of 1842 and that, as shown by the correspondence above referred to, the free and public character of the Great Lakes *and their communicating waters* was established, if necessary to be established in view of the law of nations, and that, in addition, the necessary channels lying exclusively within the territorial jurisdiction of either party were also declared to be free, open and public waters and that, in further addition, the waters not along the line of the Great Lakes and their communicating waters but running northwesterly from Lake Superior to the Lake of the Woods were also established to be of the same character and that, in still further addition, the necessary land portages along said latter line were given a

unique character similar to that of the water communications. And this in spite of the fact that said latter line was of little importance because it ran "through the wild country between Lake Superior and the Lake of the Woods."

> Lord Ashburton to Mr. Webster, July 16, 1842. Appendix XIV.

This is shown by the language and punctuation used *ex industria*, as correctly printed above.

But even if, as contended by the appellee, said clause in Article II of the treaty related solely to the line north of Lake Superior, which we do not admit, such fact would merely tend to show that the waters of the Great Lakes *and the channels between them* "were considered to be already free to the use of both governments, by the law of nations" (Appendix x) and that it was superfluous that they should be so declared (*ibid.*) and that the efforts of Mr. Webster and Lord Ashburton, culminating in the treaty, were to add to the waters so declared to be public by the law of nations those channels, necessary to commerce, which either lay within the exclusive territorial jurisdiction of one nation or which, by reason of not being a part of the Great Lakes system, required special diplomatic agreement to give them the same character.

What then, is meant by the last clause of Article II of the Webster-Ashburton treaty? This may be ascertained, as in the construction of a statute, by considering the object sought to be accomplished. We submit that such object was to establish the free, open and

public character of "all the water communications" along the line fixed by Article II. Said line ran through such water communications from the head of St. Joseph's Island to the foot of Lake Superior and from the point where it left Lake Superior to the northwest point of the Lake of the Woods. The water communications above mentioned embrace, therefore, all such water communications along the line then established. What reason could there be for establishing the public character of the unimportant waters along the line northwesterly from Lake Superior and not doing so in respect to the very important waters between the head of St. Joseph's Island and the foot of Lake Superior? Every consideration of reason and law compels the conclusion that the last-named waters were included in the provision.

Furthermore, at the very point where Mr. Webster and Lord Ashburton began to trace their line northwesterly from the head of St. Joseph's Island, the communicating waterway divided into two principal navigable channels, one passing to the eastward and one to the westward of St. George's Island, which was the most vital subject of the previous controversy. The west channel was, by the treaty, entirely within the United States, and yet it was, for many purposes, the safer and more important of the two.

Appendix IX, XII, Ex. Doc. 451, original pages 54, 99.

Furthermore, the free and public character of the easternmost of said channels was the very subject of

negotiations between the commissioners under the treaty of Ghent.

Appendix IV, IX, Ex. Doc. 451, original pages 8 and 61.

Furthermore, when the two channels converge at the head of St. George's Island, and continue westward through the channel, or strait, in which the islands now in suit are situated, **that single channel carries all the commerce of the Great Lakes,** and it is inconceivable that its open and public character, as international water, should not have been established by the language of the treaty, unless the treaty was framed on the basis that, being a single channel, dividing the two nations, its public character was already established by the law of nations.

If the public character of said strait or channel was not then established, either by the treaty or by the law of nations, then the whole object of the treaty, which was to establish the public character of the waters along the whole boundary line, was defeated, by the interruption of said character at the most important point. It is a well known fact that the commerce annually passing through said strait or channel exceeds in tonnage that passing through the Suez Canal and all the other canals and straits of the world.

The treaty, like the statute, must be considered in the light of the facts and circumstances attending its birth, and the object sought to be accomplished. The intention of the treaty is made perfectly clear by regarding "all the water communications" as referring

to the water communications which were the subject of the line established by Article II of the treaty.

**(4) Other Treaty Provisions.**

Furthermore, it has been the international policy of Great Britain and the United States to establish, in the most unmistakable manner, the public character of the waters lying between their respective territory and, wherever doubt or friction arises regarding such waters, to make their public character unmistakable by treaty, even if already so by the law of nations.

For example, Article III of the Webster-Ashburton treaty provides:

"That where, by the provisions of the present treaty, the river of St. John is declared to be the line of boundary, *the navigation of the said river shall be free and open to both parties*, and shall in no way be obstructed by either. * * * Provided always, that this agreement shall give no right to either party to interfere with any regulations not inconsistent with the terms of this treaty which the governments respectively, of Maine or of New Brunswick, may make respecting the navigation of the said river, *where both banks thereof shall belong to the same party.*"

8 U. S. Stats., 574.

By Article II of the convention of October 20, 1818, signed at London, the boundary line between the United States and the British possessions was continued from the Lake of the Woods, along the forty-ninth parallel of latitude to the Stony (Rocky) mountains.

8 U. S. Stats., 249.

That line is not a water boundary.

By the treaty of Washington, June 15, 1846, the boundary was continued from the Rocky mountains along the forty-ninth parallel to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean. Article I of said treaty concluded as follows:

"Provided, however, that *the navigation of the whole of the said channel and straits,* south of the forty-ninth parallel of north latitude, *remain free and open to both parties.*"

9 U. S. Stats., 869.

By Article 4 of the treaty signed at Washington on June 5, 1854, between Great Britain and the United States, it was agreed that citizens of the United States should have the right to navigate the river St. Lawrence and the canals in Canada used as the means of communicating between the Great Lakes and the Atlantic Ocean as fully and freely as the subjects of Great Britain, it being understood, however, that the British government retained the right of suspending such privilege on due notice.

By the same article it was further agreed that British subjects should have the reciprocal right freely to navigate Lake Michigan, so long as the privilege of citizens of the United States to navigate the St. Lawrence, above mentioned, should continue; and the United States further engaged to urge upon the State governments to secure to the subjects of Great Britain the

use of the several State canals, on terms of equality with the inhabitants of the United States.

10 U. S. Stats., 1091.

It will be observed that the above treaty engagements related to waters entirely within the land territory of the two nations.

Likewise Article XXVI of the treaty of Washington (1871) provides that:

"*The navigation of the river St. Lawrence,* ascending and descending, from the forty-ninth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, *shall forever remain free and open for the purposes of commerce* to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation."

17 U. S. Stats., 872.

An important distinction will be noticed in the above provision. Inasmuch as that portion of the St. Lawrence affected thereby lies wholly in British territory, the freedom of the waters is made subject to the laws and regulations of the sovereignty which they traverse.

By Article XXVII of the same treaty, it was provided as follows:

"The Government of Her Britannic Majesty engages to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion; and the Government of the United States engages that the subjects of Her Britan-

nic Majesty shall enjoy the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State Governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line between the possessions of the High Contracting Parties, on terms of equality with the inhabitants of the United States."

17 U. S. Stats., 872.

The treaty of 1871 made two great strides toward the greater perfection of the system of navigation afforded by the Great Lakes: first, in opening such system to the sea, and second, in providing for the reciprocal use by the citizens of both countries of the artificial aids to navigation required by natural conditions and constructed by either of the contracting nations. The ship canal at Sault Ste. Marie being then under control of the State of Michigan, a joint resolution was passed by the legislature of that State and was approved by the governor on March 23, 1872, providing:

"That the subjects of Her Britannic Majesty shall have the use of the St. Marys Falls' ship canal, and any other canal connected with the Great Lakes, or contiguous to the boundary line between the possessions of the high contracting parties in said treaty, and within the limits of this State, on terms of equality with the inhabitants of the United States."

Record, 784.

In view of the foregoing policy of the two countries concerned, irrespective of the law of nations which is

controlling in the same direction, it is impossible that the waters in the Strait of St. Mary can be classed in law as private waters or as subject to individual ownership of their bed by reason of ownership of the adjacent shore.

## C.

## The Status of the Waters Established by the Law of Nations.

It is not essential to the Government's case that it be held that the public character of the waters surrounding Islands 1 and 2 was established by the treaty of Ghent, for it is immaterial whether the waters are so established by said treaty or by the general law of nations.

In the preceding subdivision we have endeavored to show that the various treaties relating to the northern boundary of the United States, separating this country from the possessions of Great Britain, were designed to remove all doubt and causes of dispute as to the common and public character of the waters through which runs said boundary line. It is possible, and probable, that in such effort treaties have specifically declared the public character of waters which were already so by the law of nations. Particularly is this true as to the waters in question, surrounding Islands 1 and 2. For whether the waters in question, surrounding Islands 1 and 2, be a stream, river, strait or passage, their legal character depends not upon the designation by which they may be popularly known

but upon their situation and character as boundary waters between nations.

Judicial authority is not wanting as to the law applicable to waters so situated.

In a case decided in 1822 by Mr. Justice Story, involving acts of illicit trade in Passamaquoddy Bay the principal question was whether they were done within the territorial limits of the United States or within the British waters. The court held:

"The general principle in relation to the rights of a nation to rivers and bays, of which it has an exclusive and prior occupancy, is laid down by Vattel and Martens in the passages cited at the bar, need not be disputed. Whether there has been, in point of fact, such an exclusive occupancy, is often a matter of great difficulty to ascertain. The nature, breadth, and extent of a river, or bay, and the necessity of its constant use, in all parts, for purposes of trade and navigation, by the nations inhabiting the opposite banks must, in many cases, repel the supposition of an exclusive right. Where no such exclusive right exists, the general principle of the law of nations, as deduced from the authorities, is, that each nation has a right to go to the middle of the stream, calculated from low water mark, as the limit of its territorial boundary. This doctrine has been affirmed by the supreme court in the case of Handly's Lessee *vs.* Anthony, 5 Wheat. (18 U. S.) 374. But although the territorial line of a nation, *for purposes of absolute jurisdiction*, may not extend beyond the middle of the stream; yet, consistently with this doctrine, the right to the use of the *whole river* or bay for the purpose of navigation, trade, and passage, may be *common to both nations*. Such a right does not destroy the territorial jurisdiction to the middle of the stream; but it is in the nature of an easement as it is

called at the common law, or a servitude, as it is called in civil law. It is like the right of a highway, or private way, over the land of another. This right of passage and navigation must exist, as a common right in all those cases, where such passage or navigation is ordinarily used by both nations, and is indispensable for their common convenience, and access to their own shores. A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all times. If, in such a case no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of passage and navigation in both. These are all the principles which I think it necessary to bring into review on this occasion, so far as the case stands upon the general law of nations."

The Fame, 3 Mason, 147; 8 Federal Cases, page 984.

The court held that Great Britain had not acquired any exclusive right to the waters of the Bay and it is not here contended that Great Britain has acquired any exclusive right to the waters of the straits of St. Mary. Under such circumstances the court further held:

"These waters were common to all the subjects of the realm; and just as much a part of our right and inheritance, as of any other of the British dominions. * * * In truth, the law of nations must, under such circumstances, be presumed silently to prevail, and annex the bay to the middle of the stream, to the territories of the adjacent provinces;—and as there was at all times a common right of passage and navigation exercised over the whole bay, and it was necessary for

the convenience of all parties, *the whole waters must be deemed common for these purposes.*"

*Ibid.*

To the same effect is the opinion of Judge Ware, in 1823, in a case involving the same waters.

Open Boat Case, 1 Ware, 18; 18 Federal Cases, page 751.

To the same effect is the opinion of Judge Ware, in 1827, in a case involving the same waters.

The Atlantic, 1 Ware, 121; 2 Federal Cases, page 132.

In 1824 this court considered a case involving the public or private character of the waters of the St. Mary's River (not the St. Mary's River now under consideration) which formed, at that time, the boundary between the United States and the Spanish territory and now constitutes a portion of the north boundary of the State of Florida. The boundary line between the United States and the Spanish territory, by treaty, ran through the middle of said river. The only access from the ocean to the Spanish waters running into the St. Mary's, as well as to the adjacent Spanish territories, was through said river, just as the only access from the ocean to the rivers and territory of Great Britain and the United States lying west of Lake Huron is through the St. Mary's River involved in this suit. The court held, speaking by Mr. Justice Story, that under such conditions

"Upon the general principles of the law of nations, *the waters of the whole river* must be considered as

common to both nations, for all purposes of navigation, as a common highway, necessary for the advantageous use of its own territorial rights and possessions."

The Apollon, 9 Wheat., 369.

It follows, therefore, that, whether or not the treaties entered into between Great Britain and the United States established the character of the waters in question as public navigable waters, free and open to the citizens of both nations throughout their whole extent and width, they are such by the law of nations.

## D.

### The Law of Riparian and Littoral Ownership

### (1.) Public and Private Waters.

By the common law of England the soil lying beneath the navigable waters of the realm is vested in the crown as trustee for the public. The navigable waters include the adjacent seas and arms of the sea and those rivers in which the tide ebbs and flows.

Gould on Waters, secs. 4, 5.

Shively *vs.* Bowlby, 152 U. S., 57.

In this country the rights of the crown are vested in the people, represented by the sovereign States.

But grants of land bounded on private rivers above tide water carry the exclusive use and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases



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where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway.

3 Kent's Commentaries, 427.

A distinction was made, therefore, between public waters and private waters, and it is only in the latter class of waters that the proprietor of the land bordering the waters has any ownership of the soil underneath them.

Out of this distinction arose many principles of law. Some relate to the rights or easements which the owner of the adjacent shore has on and in the public waters. Others relate to the rights and easements which the public have on and in private waters. Still others relate to questions affecting no rights or easements on either side, but depending upon the same distinction between public and private waters, as, for example, the jurisdiction in admiralty cases, which attaches only to public waters.

The present case has nothing to do with any of the questions just mentioned, but depends solely upon the question—In whom is the title to the soil under the waters surrounding the islands under consideration? If the waters are private the principles of riparian ownership are applicable to land along their margin, and in that case only can it be asserted that the title to the islands is in the owner of the shore opposite which they lie. If, on the other hand, the waters are public no question of riparian or littoral rights can arise therein and by no possibility can the title to these islands be in the owner of the land bordering the

waters, except by special deed or grant distinct from his title to that land.

For wherever the title to the islands has been determined to be in the owner of the neighboring shore, solely by virtue of such ownership, it has been so held by reason of his ownership of the soil under the water.

3 Kent's Commentaries, 428.

It is conceded that the patent from the Government upon which the defendant relies in this case makes no mention whatever of Islands Nos. 1 and 2.

No question of alluvion or reliction is involved in this case, for the islands were not formed by gradual and imperceptible accretion from the water or by gradual and imperceptible recession of the water. On the contrary, they are shown to be of rock, projecting several feet above high water, and to have been so when the public surveys were made in 1845, and for geological reasons must have been so when the State of Michigan was admitted to the Union in 1837.

Testimony of Spalding, record, 199.

Testimony of Stradley, record, 205.

They are also shown by the testimony to be situated about 400 feet from the original shore line on the south.

Testimony of Ripley, record, 235.

There is perhaps no branch of the law which has given rise to greater uncertainty and embarrassment, or which has resulted in more conflicting decisions in the courts of the United States and of the various States, than that relating to public and private waters. The reason for this lies in the different physical condi-

tions prevailing in this country from those in England where the common law had its birth and development.

Public waters in England were defined as those in which the tide ebbs and flows because, with a few small and unimportant exceptions, there was no navigable stream in the country beyond the ebb and flow of the tide. When, therefore, the common law of England came to be applied here, it was found to be totally inapplicable. For many years, however, such was the force of precedent, the courts of this country continued to administer the law of waters according to its letter instead of its spirit, to the great injury of both public and private interests. The admiralty laws, for example, were held to apply only to tide waters because only such waters were navigable according to common law. And this in spite of the express provision of the Judiciary Act of 1789, that the admiralty jurisdiction of the United States should extend to waters which are navigable from the sea by vessels of ten or more tons burthen, as well as upon the high seas.

1 U. S. Stats., 77.

Finally, however, this court finding the admiralty jurisdiction of the United States thus excluded from waters to which it ought to attach, turned to the reason of the law instead of its letter and found the law of waters, when properly construed, to be in harmony with the physical character and needs of this country. Reversing its previous rulings, the court held:

"As the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public char-

acter of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described." * * *

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes *and the waters connecting them* are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

The Propeller Genesee Chief *vs.* Fitzhugh, 12 How., 455, 457.

This decision, rendered in 1851, effected a revolution, so far as the jurisdiction of the United States extends, not in the character of public waters, but in the definition thereof. The new definition recognized in terms the public character of those waters which, by reason of the superior interest in them of the public as against the owners of the shores, were public in fact. The islands in question are situated in non-tidal waters and are not public under the English definition. But those waters are of the very class which are declared to be public by the American definition, and by the decision just cited.

Meanwhile the courts of the various States had also been wrestling with the question of public versus private waters, with varying results. Some of them

still adhere to the definition of the common law. Others follow the definition established in the Genesee Chief case. It is asserted that in Michigan the rule of the common law prevails, but that statement must be limited to *inland* rivers and *inland* lakes. The decisions of that State certainly do not follow the common law as to islands situated in the Great Lakes, or in their communicating waters, as will be shown later.

**(2.) The Great Lakes.**

By the strict definition of the common law, as shown above, the owner of land bordering on the Great Lakes, or their communicating waters, would also be the owner of the soil underneath the waters therein. The assertion of such a right has not been lacking but it needs only a single citation to show that such a contention is utterly untenable. In the great case involving the bed of the lake in front of the City of Chicago this court held:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tidewaters, within the limits of the several states, belong to the respective states within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states." * * *

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce

with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." * * *

"The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership

of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidewaters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

Illinois Central R. R. Co. *vs.* Illinois, 146 U. S., 435, 436.

It is noteworthy that the case just cited arose in Illinois, which is one of the States that have adhered to the strictness of the common-law rule.

16 Am. and Eng. Enc. of Law, 1st Ed., 253.

Soon after the admission of Michigan to the Union the question of public and private waters was ably considered and in 1843 a decision was rendered which is in accord, in all points, with the decision in the Genesee Chief case rendered eight years later by this court. The case involved alleged riparian rights at the mouth of the river Raisin on the border of Lake Erie, and the court held:

"The bed of the stream is public property, and belongs to the State. This is the case with all meandered streams, no part of them being included in the original survey; and the common-law doctrine of *usque ad filum aquæ* is not applicable to them. The public owns the bed of this class of rivers, and is not limited in its right to an easement, or right of way only. So, with regard to our large lakes, or such parts of them as lie within the limits of the State. The proprietor of the adjacent shore has no property whatever in the land covered by

the water of the lake. The land under complainant's warehouse and wharf belongs to the State."

La Plaisance Bay Harbor Co. *vs.* City of Monroe, Walker's Chancery Reports, 168.

It is a somewhat prevalent impression that the rule of the common law as to waters prevails in Michigan. This mistake is not surprising, for it has been vigorously asserted by counsel in many cases, and has been declared in text-books, that the decision in La Plaisance Bay Harbor Co. *vs.* Monroe has been overruled. The Supreme Court of Michigan, however, in the recent case of People *vs.* Silberwood (1896), has declared that this is not true, at least so far as the Great Lakes are concerned. In that case the court admits that there is language used in some of the cases previously decided by the court that would tend to support the claim that the shoreowner upon the Great Lakes has the same right to the land (subject to the right of fishing and navigation) which is possessed by the shore owners on rivers, but says that, on the other hand, there are expressions used in other cases tending to show that, so far as the Great Lakes are concerned, the law is as stated in the La Plaisance case. In support of this the court cites Sterling *vs.* Jackson, 69 Mich., 488. After stating that in none of the cases previously considered had the question of the title to the bed of the Great Lakes been directly at issue, the court speaks approvingly of the decisions of other States as follows:

"Other States having like interests to our own State in the waters of these great inland seas have had the precise question involved here before them and have

passed upon it. In Diedrich *vs.* Railway Co., 42 Wis., 248, it was held that the vested right of the riparian owner on the Great Lakes is that of navigation to and from his premises, with the right of wharfage. The decisions in New York (Champlain, etc., R. Co. *vs.* Valentine, 19 Barb., 484), in Pennsylvania (Fulmer *vs.* Williams, 122 Pa. St., 191) and in Ohio (Sloan *vs.* Biemiller, 34 Ohio St., 492) all hold that the fee of the riparian owner ceases at the low-water mark."

People *vs.* Silberwood, 110 Mich., 106, 107.

The court then quotes from Illinois Central Railroad Co. *vs.* Illinois (146 U. S., 387) and says:

"It seems to me the reasoning of this case is without flaw, and that the law enunciated therein ought to stand as the law of this State. It commends itself to one's reason and judgment and avoids many difficulties incident to a different construction of the law. It is in harmony with the doctrine laid down in the early case of La Plaisance Bay Harbor Co. *vs.* Council of City of Monroe, which I do not think has ever been overruled in this State so far as it affects the rights of shore-owners on the borders of the Great Lakes. This doctrine, too, is in harmony with the decisions in all of the States bordering on these great seas."

*Id.*, 108.

In 1897 the Supreme Court of Michigan reaffirmed the doctrine of People *vs.* Silberwood and held that an island in Lake Huron did not pass to the owner of the adjacent shore.

Sherwood *vs.* Commissioner of State Land Office, 113 Mich., 227.

That case is particularly interesting in the present discussion, because the island in question was situated in the same waters in which lie the islands now under consideration, *i. e.*, the communicating waterway between Lake Huron and Lake Superior, and some miles north of Detour, where said waterway debouches into Lake Huron.

In 1898 the court considered the title to an island in Saginaw Bay, Lake Huron, and reaffirmed the doctrine of People *vs.* Silberwood, holding that the limit of private ownership is the water line.

People *vs.* Warner, 116 Mich., 228.

Again, in 1901, the Supreme Court of Michigan considered the title to an island in the St. Clair river. The court were unanimous in holding that the island belonged to the State but divided on the question whether the State took title as swamp land under the act of Congress of 1850 or as submerged land by virtue of the sovereignty. The case is illumined by the exhaustive and scholarly minority opinion of Justice Hooker, who took the position that the land was submerged. The majority of the court held it to be swamp land but did not question the views of Justice Hooker as to the ownership of the bed of the waters in which the island lies.

State *vs.* Fishing and Shooting Club, 127 Mich., 580.

It is evident, therefore, that the law of Michigan, so far as the Great Lakes are concerned, is in full harmony with the American doctrine of public waters.

**(3.) The Connecting Waters Between the Great Lakes.**

Islands 1 and 2, lying within the short communicating waterway between Lake Huron and Lake Superior, are, under any proper construction of the term, within the waters of the Great Lakes.

The essence of the decision in Illinois Central Railroad Co. *vs.* Illinois was that the navigable waters of the Great Lakes are inland seas, that the soil under the waters is held by the State in trust for the people, and that an attempted conveyance of that soil by the legislature was inoperative as "in disregard of a public trust."

146 U. S., 460.

The decision rests upon the principle that the preeminent interest of the public in those waters, for the purposes of navigation and other purposes, is superior to that of individuals owning the lands bordering thereon, and that private ownership of the bed of the waters is absolutely inconsistent with the public interest, because

"Necessarily must the control of the waters of a State over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use."

*Id.*, 456.

This ruling is in accordance with the common law of England governing tidewaters.

Martin *vs.* Waddell, 16 Peters, 418.

Stockton *vs.* Balto. and N. Y. Railroad Co., 32 Fed. Rep., 9, by Mr. Justice Bradley.

The Great Lakes are, strictly speaking, Lakes Superior, Michigan, Huron, Erie and Ontario. But if the public interest in those lakes demands that the title to the beds thereof remain in the public, it is equally necessary that the beds of the communicating waters remain also in the public, for it is essential to the navigation of these "inland seas" that it be as free from one into another as within the waters of a single Great Lake.

And if the pre-eminent interest of the public in the waters, for purposes of navigation and other purposes, forbids private control of such waters and the bed of the lake underneath them at the city of Chicago, where in front of that city commerce has the whole breadth of Lake Michigan upon which to float, still more must private ownership be forbidden in those narrow waters connecting the Great Lakes, where such commerce is confined within a narrow channel. It is utterly incompatible with the principle established in the Illinois Central case, approved and followed by the Supreme Court of Michigan in the Silberwood case, that at Islands 1 and 2, at the city of Sault St. Marie, where the Great Lakes narrow to the width of a mile, any private ownership should be permitted in the waters or the bed thereof. But if the bed of the strait surrounding the Islands 1 and 2 be not subject to private ownership but be held by the State of Michigan in trust for the people, no title to these islands can arise by virtue of any ownership of the adjacent shore.

In 1893 the character of the Detroit River, which is a communicating water-way between the Great Lakes, was considered by this court in United States *vs.*

Rodgers (150 U. S. 249). The case arose upon an indictment under Section 5346 of the Revised Statutes of the United States for committing an assault with a dangerous weapon on board a vessel within the admiralty jurisdiction of the United States and not within the jurisdiction of any particular state of the United States, viz, in the Detroit River, within the territorial limits of the Dominion of Canada. The question before the court, upon a certificate of division of opinion between the judges of the Circuit Court of the United States for the Western District of Michigan, was whether the courts of the United States had jurisdiction under said section.

The statute under consideration is as follows:

"Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part of the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars, and by imprisonment at hard labor not more than three years."

This court held that the words "in any *arm of the sea* or in any river, haven, creek, basin, or bay" must be read in conjunction with the term "high seas" and "as referring to navigable waters out of the jurisdiction of any particular state, but connecting with the high seas mentioned" (page 259). The question neces-

sary to be decided was, therefore, whether the Great Lakes are "high seas" and the court held:

"The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, states, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree. * * * It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a state, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or states or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated."

Pages 256 and 266.

But if, as held by this court, the Great Lakes are high seas, the communicating water-ways between them cannot have the legal character of rivers above tide water, nor can they be subject to the riparian incidents attaching to non-tidal waters. The lakes and the waters connecting them are in the same class, and for the same reasons.

"The lakes **and the waters connecting them** are undoubtedly public waters and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

Genesee Chief *vs.* Fitzhugh, 12 How., 457.

It is true, as held by the court, that the Great Lakes "possess every essential characteristic of seas" except "the fact that their waters are fresh and not subject to the tides" and it is equally true that the waters connecting them possess, with the same exceptions, every characteristic of a strait, or sound, or arm of the sea.

The same reason and the same necessity exists that they should have the same legal status of tidal waters which was given by the Genesee Chief case to the Great Lakes between which they lie.

"Lord Hale, following the exact definition given in the Book of Assizes (22 Ass. 93) says: 'That is called an arm of the sea, where the sea flows and reflows and so far only as the sea flows and reflows.' Harg. Law Tracts, pt. 1, c. 4, p. 12; *Id.* pt. 2, c. 7, p. 88; 1 Hale, P. C. c. 32, p. 424; 2 Hale, P. C. c. 3, pp. 13-16, 64; Com. Dig. 'Navigation,' B." * * *

"An arm of the sea may include various subordinate descriptions of waters where the tide ebbs and flows. It may be a river, harbour, creek, basin, or bay; and it is sometimes used to designate very extensive reaches of waters within the projecting capes or points of a country."

Mr. Justice Story in United States *vs.* Grush, 26 Federal Cases, page 51.

We conceive, therefore, that it was the intention of this court in United States *vs.* Rodgers to place both

the Great Lakes and their connecting waters within the class of tidal waters as dealt with by the common law and that, in considering therein the character of the Detroit River, it was regarded as an "arm of the sea" and thus within the meaning of Section 5346 of the Revised Statutes.

In Kingman *vs.* Sparrow, 12 Barbour (New York), the controversy involved premises consisting of a portion of Black Rock dam upon which mills were erected and a storehouse erected upon piles in Black Rock Harbor. The dam was erected by the State in 1824-'5, in the bed of that part of Niagara river passing between Squaw Island and the east bank of the river. The mills and warehouses were built by Kingman, an owner, and after the death of Kingman his widow claimed dower therein. Kingman claimed under a patent from the State for lands bounded by "the waters of said outlet," viz: "the outlet of Lake Erie," and mesne conveyances variously describing the western boundary as "the east bank of the waters of the outlet of Lake Erie," "the outlet of Lake Erie or Niagara river," and "bounded west on the Niagara river," etc., "subject only to such claims as the State may have on said lot in consequence of their right of navigation, and of the public works connected therewith."

The court, after calling attention to the fact that in the treaty between the Seneca Nation and Robert Morris, by which the Seneca Nation granted all their lands in western New York (but not including the land in question), the adjacent waters were described as the "*strait* of Niagara," and after admitting that "when

a river is designated as a boundary it is an entire thing, and generally by intendment of law the line goes to the center or thread," held:

"Whatever may be the proper construction of the description in the patent to Parish, it is clear that by the grant from Parish to the Porters no part of the bed of the river passed. In that deed the land is bounded 'on the west by the east bank of the waters of the outlet of Lake Erie.' This entirely excluded the river. As the Porters acquired no title to the bed of the river, they could grant none. * * * But independent of this view of the case, I am prepared to hold that the common-law rule as applied to the construction of descriptions in a deed bounding the premises by, or along, or upon a river, has no application to lands bounded by the Niagara River. * * *

"Chancellor Walworth has in several cases maintained, with great learning and ability, the applicability of the common-law rule to our rivers. He says, however, that 'the principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes and inland seas which are wholly unprovided for by the common law of England' (Canal Com'rs *vs.* The People, 5 Wend., 447). In the same case (17 *id.*, 597) he says, 'a different rule must probably prevail as to our large navigable lakes which are mere inland seas, although there is neither ebb nor reflux of the tide; and also as to those lakes and streams which form the natural boundaries between us and a foreign nation.' Other members of the court expressed the opinion that the English rule had no application to the large navigable rivers of this country. But the exception contained in the Chancellor's opinion is sufficient to exclude the operation of the rule where lands are bounded by or upon the Niagara river. It forms the natural boundary between this country and a foreign nation.

The State has always claimed the islands in the river, and has granted them. The papers in the present case show that Parish, in 1817, took a patent from the State, of 'Squaw Island,' lying in the Niagara river opposite the premises granted to him in 1804, and upon which island the Black Rock dam abuts. If the lands granted by the patent of 1804 extended to the center of the river, Parish then obtained title, in all that part of Squaw Island lying opposite the 'mile square,' and there was no occasion for his purchase in 1817."

12 Barbour, 205-207.

The above case has become the leading case in New York upon the question directly here in issue, viz., the law of riparian ownership in lands bordering upon the water communications between the Great Lakes. The principle there established has never been discredited in that State but, on the contrary, has been reiterated and confirmed in all subsequent decisions.

Hensler *vs.* Hartman, 16 Abbott's New Cases, 176, note.

In the matter of the State reservation at Niagara (16 Abbott's New Cases, 159) it would seem that every possible question which might arise in limitation of the public ownership of the bed of the waters connecting the Great Lakes was exhaustively discussed, both in the arguments of counsel and in the decision thereon, the controversy relating to that precise place in the so-called Niagara river (more properly, the *straits* of Niagara) at which the bed of the stream, if anywhere, would be held to vest in the riparian owners instead of in the State. For at that place, by the cataract of

Niagara, the navigability of the water is utterly destroyed. Such non-navigability was strongly insisted upon by counsel, as was the separation of the river or strait into more than one channel. But it was held:

"Those judges who have maintained the applicability of the common-law rule to our inland, fresh water, navigable streams, have excepted boundary rivers from the rule; witness the dissenting opinion of Chancellor Walworth in the case of Canal Appraisers *vs.* People (17 Wend., 570, 597, 598) and the opinion of Chief Justice Ruger in the very recent case, Smith *vs.* City of Rochester (92 N. Y., 463, 479). No case can be found, we think, in the courts of New York, where any intimation is thrown out, much less decision made, that, in the case of empire-dividing streams, especially of such magnitude and dignity as the St. Lawrence and the Niagara, and having the navigable qualities which they possess, the law, without unmistakable affirmative grants from the State conveying the title, has permitted the proprietors of the land bounded on such streams, to extend their ownership, by implication, beyond the margin of the rivers and to the center of their beds. * * * We think it well established as the law of this State that a river of the importance, dimensions and navigability of the Niagara, and parting two nations,—in fine, that the Niagara river—rises above the rank of those inland streams of fresh water, where the bordering owners, by the mere force of being bounded, in their grants, upon the river, take title to the middle of the flow."

16 Abbott's New Cases, 185-186.

Congress has recognized the international character of Niagara River and the right of control, *for all purposes,* residing in the United States jointly with Great

Britain, of the waters flowing through that channel, which provides that any diversion of water "shall not injure or interfere with the navigable capacity of said river, or its integrity and proper volume as a boundary stream, or the scenic grandeur of Niagara Falls."

Act of June 29, 1906, 34 U. S. Stats., 627.

As to the non-navigability of the waters and the diversity of the channels and the contention of the counsel for the island riparians "that upon the grant of the islands a new *filum aquæ* was established, not only between them and the main land, but new ones between the islands themselves; that the floods which rush through the narrow interspaces can be regarded neither as navigable nor boundary streams, and that it follows that the common-law rule applies at those places, giving the island owners title on each side respectively to the center of the stream dividing the isles," it was held:

"But we think the river is to be considered as *one* river—a navigable and boundary stream—and that, though its great volume flows between these islands and the Canadian shore and another portion—perhaps a third part,—between such islands and the American shore, and smaller portions—very small indeed as compared with the great floods of the strait,—force their way between the anchored islands near the verge, yet the whole river does not, by any of these short divisions, change the nature of its entirety and become so many inconsiderable and different streams, losing the character it held before it took these smaller channels to the Falls, and which it again resumes immediately below."

*Id.*, 188.

Only by the employment of artificial means can the Great Lakes form an uninterrupted line of navigation with the ocean. Notable among such artificial means are the many miles of artificial channels paralleling the St. Lawrence River, the Welland Ship Canal and locks, connecting Lake Ontario with Lake Erie, and the ship canal and locks at Sault Ste. Marie. Where the natural navigation is the principal one, and the artificial merely dependent and ancillary thereto, and the greater part of the water is in fact navigable within the ordinary acceptation of the word, such water is public navigable water.

So held in United States *vs.* Montello, 20 Wall., 430.

The Supreme Court of Michigan has also, in its most recent decision, recognized the public character of the waters connecting the Great Lakes as well as of the Great Lakes themselves. For in State *vs.* Fishing and Shooting Club, already referred to, the island in question was situated not in the Great Lakes but in the connecting waters of the strait known as the St. Clair river. If the title to the bed of the waters surrounding that island were not in the State, Justice Hooker's elaborate opinion holding the island to belong to the State as submerged land, would not have been written, nor would the other members of the court have held the title to be in the State by virtue of the swamp grant. For whether the lands were submerged or swamp, the title to them would have been in the owner of the adjacent shores. That decision must be accepted, therefore, as the latest and authoritative declaration of the

law of the State as to the title to the bed of the communicating waterways between the Great Lakes, and it entirely rejects the idea of riparian ownership therein. 127 Mich., 580.

Attention is here again called to the fact that the Sherwood case (113 Mich., 227) related to an island in the waters between Lake Superior and Detour, the very waters in which Islands 1 and 2 are situated, and which are included in the designation "St. Mary's River" wherever that term is used instead of "Straits of St. Mary" to designate the communicating waterway between Lake Superior and Lake Huron.

The title to Islands 1 and 2 did not, therefore, pass as an incident to any ownership of the adjacent shore, if any such ownership exists. Nor is the title to the islands in the State of Michigan, inasmuch as they were never specifically granted to said State, and did not arise from the waters subsequent to the grant, in 1837, of the waters in which they lie. The title to them remained in the United States, subject to such further disposal as the United States might lawfully make of them.

### (4) Legislative Recognition by the State of Michigan of the Public Character of the Connecting Waters Between the Great Lakes.

Our contention that the waters connecting the Great Lakes have the same legal character as the Great Lakes themselves does not depend alone upon judicial construction.

Attention is called to an act passed by the legislature of Michigan in 1895, later than the decisions of the courts of that state upon which the appellee relies, and entirely in line with the decisions of the Supreme Court of Michigan upon which the appellant relies. The title and act are as follows:

"AN ACT to set aside certain submerged lands in Lake Erie **and Detroit river** lying east of and adjacent to Monroe and Wayne counties, for public shooting grounds, to make it unlawful to cut and destroy the rushes and other submarine vegetation on such submerged lands and to provide a penalty therefor.

"SECTION 1. *The People of the State of Michigan enact,* That all that part of Lake Erie lying adjacent to the surveyed lands of Monroe and Wayne counties and any submerged lands within the surveyed lines of said counties and connected with Lake Erie **and Detroit river,** providing such surveyed lands are owned by the State of Michigan, shall be and hereby are set apart and dedicated for a public shooting or hunting ground for the benefit and enjoyment of the people of the State of Michigan, for a distance extending one mile into said Lake Erie, the eastern line of the submerged lands and waters hereby reserved being one mile distant from the surveyed lines of the east side of said counties and parallel thereto: *Provided,* That this reservation and dedication shall not interfere with, or detract from, any rights or privileges as to fishing now enjoyed by any person, or the public.

"SEC. 2. All persons who now have, or shall hereafter locate upon any part of such submerged lands or lake, or occupy the same except as herein provided, shall be considered trespassers and may be prosecuted as trespassers upon the public lands in the manner now

provided by law: *Provided*, That such waters shall be free for all purposes of navigation.

"SEC. 3. It shall be unlawful for any person to cut, or otherwise destroy the rushes and other submarine vegetation growing on such reserve without the consent of the board of supervisors of said counties, and any person or persons who shall wilfully cut or destroy the same, or cause the same to be done, knowingly, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail of said Monroe or Wayne county not exceeding ninety days.

"This act is ordered to take immediate effect.

"Approved May 4, 1895."

Public Acts of Michigan, 1895, page 231.

"While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions."

Coosaw Mining Co. *vs.* State of South Carolina, 144 U. S. 550.

United States *vs.* Fisher, 2 Cranch 358.

United States *vs.* Palmer, 3 Wheaton 610.

The body of the above act is drawn somewhat obscurely, but it has been judicially established by the Supreme Court of Michigan (*in 1896*) that it refers not merely to submerged lands adjacent to upland owned by the state, but to submerged land adjacent to upland owned by private proprietors. It is also clear that, while the case arose under that portion of the act which relates to Lake Erie, the act itself relates not merely to submerged lands in the Great Lakes, but also

to those in a communicating waterway between them, viz: Detroit River.

The case arose by an arrest for cutting rushes in Lake Erie "on submerged lands adjacent to the property of the Monroe Marsh Company, * * * not for the purposes of navigation, or of fishing or in the enjoyment of fishing privileges," and raised the entire question of the title of the state to such submerged lands. The decision of the court recognized and approved the principle established by the Michigan courts in the early La Plaisance case (*supra*) and by this court in Illinois Central Railroad Co. *vs.* Illinois (*supra*).

People *vs.* Silberwood, 110 Mich. 106.

The act must be regarded as declaratory of the doctrine announced in the La Plaisance and Illinois Central cases and as overruling any expressions of opinion to the contrary which may be found in Lorman *vs.* Benson (8 Mich. 18) and Ryan *vs.* Brown (18 Mich. 196) and in any other state decisions rendered prior to 1896.

Attention is also called to the act of the Michigan legislature of April 21, 1883, Compiled Laws of Michigan, 1897, section 6797, which provides that water-power companies shall have power—

"Third. To divert into any canal, excavated or constructed under the provisions of this act, waters from Lake Superior or St. Marys River, to flood lands belonging to said company by constructing the necessary dams in said canal, subject to the consent of the board of supervisors of the proper county in which said waters so diverted are situated."

Here is a distinct declaration by the legislature of Michigan that the very waters in which the islands in question are situated belong to the State of Michigan, for otherwise the legislature would have no power to pass said act. But, as shown herein, if the State possesses such authority, it has it by reason of its sovereignty and ownership of the submerged lands and holds it subject to the trusts and limitations set out in the Illinois Central case (*supra*).

### (5) Michigan Cases Distinguished.

In the court below several Michigan cases were relied upon by the appellee, as tending to show that the principle for which we have above contended has not been recognized in the adjudication of cases involving waters connecting the Great Lakes, within the territorial jurisdiction of Michigan.

We submit that said cases, rightly considered, do not necessarily establish, as a principle of law, that the owner of the shore of such waters is the owner of the bed of the waters out to the international boundary. Every shore owner has certain riparian rights by reason of such ownership, whether the waters be public or private, interior or international waters. Such rights are those of wharfage adjacent to his shore land and access from such shore land to the navigable channel. Where, therefore, a case arises which can be determined by consideration of such rights of the shore owner, and the opinion further holds that the shore owner is the owner of the bed of the waters, the latter portion of the opinion may properly be regarded as dic-

tum, because not necessary to the determination of the case.

In Lorman *vs.* Benson (8 Mich., 18), decided in 1860, the plaintiff's water front in the Detroit river was obstructed by a boom of logs, which not only prevented him from gathering ice in the customary place in front of his property but also prevented access to his property by water except "by circuitous and inconvenient routes." The court held in favor of the plaintiff and in so holding stated that title to the soil under the stream is in the owner of the adjacent bank. We submit that such holding was not necessary to the determination of the case, which might properly have been decided upon the right of access alone.

In Ryan *vs.* Brown (18 Mich., 196), decided in 1869, the case arose from an attempt by the canal board, which was operating, for the State of Michigan, the lock at Sault Ste. Marie, which was then the property of the State, to remove obstructions consisting of a wharf and cribs near the foot of the canal. The canal board claimed that such structures were an obstruction to navigation, but the court held that this was not true. The question resolved itself, therefore, into the right of the State, through its authorized agencies, to destroy or remove, without compensation, structures in aid of navigation erected by an owner on his water front. The real question involved, therefore, was the shore owner's right of access to navigable waters by means of his wharf and the right to maintain such structures under the circumstances stated. The case could well have been decided without determining to whom the bed of the waters belonged and the opinion of the court to the

effect that the bed of the waters belonged to the wharf owner is clearly beyond the necessities of the decision.

In Clark *vs.* Campau (19 Mich., 325), decided in 1869, the defendant drove piles upon the submerged land opposite his own land (we understand for wharfage purposes) and was sued by the complainant, his adjacent shore owner, for alleged encroachment upon complainant's riparian rights. The whole question lay in the controversy whether such riparian rights were defined by lines running at right angles to the stream or by the boundary line on the shore extended in the same plane. It is obvious that the case could be decided upon the principles governing rights of wharfage and access, without determining the ownership of the submerged land in front of the shore titles and that anything in the opinion of the court as to such ownership was unnecessary.

In Backus *vs.* Detroit (49 Mich., 110), decided in 1882, the complainant, owning shore lots on each side of a thirty foot street in the city of Detroit, built wharfs in front of said lots and deepened the intervening bed of the water for a slip, claiming private rights in said slip and the land underneath by virtue of conveyances. The city claimed that by the plat dedicating the street a way was dedicated, not to the bank merely but "up to and over the waters of the Detroit River to the channel bank thereof, or so far towards the same as should be desirable or necessary to the people of the city of Detroit." The charter of the city conferred power upon the common council to erect, repair and regulate public wharfs and docks at the ends of streets and the city had entered into a contract for the construction of a

wharf in extension of said street to the outer line of complainant's wharfs aforesaid. Here also it is obvious that the case really involved merely the right of access or wharfage and that the decision of the court, sustaining the claim of the city, could have been made without determining the title to the submerged land.

In Hall *vs.* Alford (114 Mich., 165), decided in 1897, the question arose by trespass upon marsh *lands* adjacent to an island in Detroit River which are dry at certain seasons of the year and at other seasons are covered by water to a depth of ten or twelve inches. The court held that such lands do not lie in navigable waters, and that the trespass by the defendants was not warranted, "whatever rights they may have had to anchor their boat in the deep water of the river, and there hunt wild fowl."

In Commissioners *vs.* Detroit (117 Mich., 458), decided in 1898, involving a nuisance maintained by the defendant by leaving a sunken steamboat in front of a park controlled by the complainants, the court held that the wreck was a nuisance and that the city was responsible therefor. In the course of the opinion it was said: "This case shows not only a nuisance by obstruction to navigation, but an incumbrance of complainant's property, as for many purposes the ownership of complainant extends to and includes the place where this wreck is." It is evident that the case could have been decided and, we submit, was decided, without determining the title to the bed of the Detroit River. The "many purposes" clearly include rights of wharfage and access, which were impaired by the obstruction and

which were in themselves sufficient for the determination of the case.

In Scranton *vs.* Wheeler (113 Mich., 565), decided in 1897, the case arose by ejectment brought by a shore owner on the St. Mary's River against the superintendent in charge of the government works at Sault Ste. Marie, the latter having, in the course of improvements in aid of navigation, cut off the plaintiff's access to the open water. In the course of the opinion it is stated—"It is conceded that under the law of Michigan the title to submerged land is in the adjoining owner to the thread of the stream" but it is not clear whether this point is conceded by the court or by the defendant. The court properly held that, *even if* the plaintiff owned the submerged land, such ownership is subject to the paramount right of the United States to use this land in such manner as they shall determine to be necessary in aid of navigation. It is evident that the essence of the case consisted in the right of access on the one hand and the paramount right of the United States on the other, and that any decision or opinion upon the ownership of the submerged land was not necessary.

That the issues in Scranton *vs.* Wheeler were thus limited is conclusively shown by the opinion of this court rendered in that case on December 12, 1900. In that opinion Mr. Justice Harlan says:

"The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States, of the taking of private property for public use without just compensation, has any application to the case of an owner of land bordering on a *public navigable river* whose *access* from his

land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from, but in front of, his upland, and which pier was erected by the United States, not with any intent to impair the rights of riparian owners, but for the purpose only of improving the navigation of such river."

Scranton *vs.* Wheeler, 179 U. S., 153.

The question so stated was decided in the negative, the court holding that Scranton had no rights amounting to "private property" in the soil of the waters. It should be noted that the controversy arose in the very waters now in question and a short distance from the islands involved in this suit. Furthermore, the court held:

"The question before us does not depend upon the inquiry whether the title to the submerged lands on which the new south pier rests is in the State or in the riparian owner.

"It is the settled rule in Michigan that 'the title of the riparian owner extends to the middle line of the lake or stream of the INLAND waters.' Webber *vs.* Pere Marquette Boom Co., 62 Mich., 636."

*Id.*, 163.

The dissenting opinion, written by Mr. Justice Shiras, agrees with the opinion of the majority of the court as to the real issue involved in the case, which is merely the *right of access* (page 169), and holds that Scranton, although a shore owner in these very waters at Sault Ste. Marie, "has failed to show any title to the submerged land" (168), but maintains that the complainant would be entitled to relief for the obstruction to his right of access, in a case properly raising that

question. In the dissent Mr. Justice Gray and Mr. Justice Peckham concurred.

The controversy involved in Scranton *vs.* Wheeler had previously been the subject of consideration in the Circuit Court of the United States and in the Circuit Court of Appeals for the Sixth Circuit. When the case was before the Court of Appeals the decision of the Circuit Court was affirmed, the court holding, as later did this court, that the plaintiff has no such ownership of the bed of the stream as makes its use by the United States for the improvement of navigation a taking of private property.

57 Federal Reporter, 803, 815.

The court also held:

"The doctrine that the title to the submerged lands within the banks of navigable rivers belongs to the States, respectively, *within which* such rivers are situated, and not to the United States, was settled at an early day."

*Id.*, 810.

The Court of Appeals then held that the case was one where the grant to the plaintiff does not by construction extend his title to any part of the soil beneath the waters of the stream along which it lies (page 811) and proceeded to consider the effect of the law of Michigan upon the plaintiff's title, as follows:

"As an incident to ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land

to the center of the stream. Ryan *vs.* Brown, 18 Mich., 207; Lorman *vs.* Benson, 8 Mich., 18; Boom Co. *vs.* Adams, 44 Mich., 403, 6 N. W. Rep., 857. This, being the well-defined law of Michigan, is the law applicable to the rights of the plaintiff in this case, and controlling as to the *locus in quo*. Under the law of Michigan, the plaintiff is therefore seized of the legal title to the submerged land upon which the United States has constructed the pier in question."

Pages 811, 812.

We submit that the question of title to the submerged lands so decided by the Court of Appeals was not necessary to the disposal of the case and need not therefore be regarded as a precedent adverse to the contention of the United States in the present case (see the opinion of this court above cited), and that the Court of Appeals was misled as to what really is the law of Michigan upon waters of this class.

For the reasoning of that court starts from the premise above quoted that the submerged lands within the banks of navigable rivers belongs to the States *within which* such rivers are situated. But the waters here involved are not a part of a river *within* the State of Michigan. On the contrary they are external waters bounding the State of Michigan, a portion of which are within the territorial jurisdiction of the State, but the whole of which, as hereinbefore shown, are free, open, public and international waters. The three Michigan cases cited by that court are not, as shown above, binding precedents establishing private ownership in waters of this class. Two of the three cases cited at the top of page 812 related to the right of access and did not

necessarily involve the title to the bed, and the other case (Boom Co. *vs.* Adams) related to inland waters of the State.

Other cases relied upon by the defendant relate to *inland rivers and lakes* in the State of Michigan. As the waters in those cases lack the public international character which has been given to the waters now in controversy by treaty, or by the law of nations, or by both, we do not think it necessary to discuss those cases.

The rule of law actually prevailing in the State of Michigan as to riparian rights was announced by the Supreme Court of Michigan in 1886, with very careful qualification, as follows:

"It is the settled rule in this State that the title of the riparian owner extends to the middle line of the lake or stream OF THE INLAND WATERS."

Webber *vs.* Boom Co., 62 Mich., 636.

That case related to interior waters of the State, viz: Pere Marquette Lake, which "is a widening of the Pere Marquette River, which flows from the interior of the State and discharges through a narrow channel into Lake Michigan a short distance from Pere Marquette Lake."

*Id.*, page 631.

In the rule announced, as above, by the Michigan Supreme Court, the words "inland waters" evidently and necessarily refer to waters within the body of the State and do not mean merely waters inland from the sea. For, if they were used in the latter sense, the words "lake or stream of the inland waters" would include

the waters of the Great Lakes, viz: Lake Huron, Lake Michigan and Lake Erie, which would be contrary to the principle established in Illinois R. R. Co. *vs.* Illinois, 146 U. S., 387.

In addition to some of the cases above mentioned the following cases were also cited in the opinion of the Court of Appeals:

Rice *vs.* Ruddiman, 10 Mich. 125.

Bay City Gas-Light Co. *vs.* Industrial Works, 28 Mich. 182.

Turner *vs.* Holland, 65 Mich. 463.

Grand Rapids *vs.* Powers, 89 Mich. 94.

Grand Rapids & Indiana Railroad Company *vs.* Butler, 85 Mich. 246.

All of said cases likewise refer to *inland* rivers in Michigan and, in our view of this case, do not establish a rule applicable to international waters lying between the State of Michigan and the British possessions.

The case of Grand Rapids & Indiana Railroad Company *vs.* Butler involved two small islands in Grand River, an interior stream of the state, forty miles from its mouth.

"The court held that the well-recognized rule in Michigan was that a grantee of land bounded in the deed of conveyance by a stream takes title to the land under the water to the thread of the stream *in the absence of an express reservation;* that reservation cannot be implied; that when the government *has surveyed its lands along the bank of a river* and has *sold and conveyed such lands by government subdivisions,* its patent conveys the title to all islands lying between the

meander line and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserves them when not surveyed."

159 U. S. 90-91.

But, as will be hereafter shown, the mainland at Sault Ste. Marie had been expressly reserved, the government had not surveyed its lands along the bank, and has not sold and conveyed such lands by government subdivisions. The case therefore is clearly distinguishable from the case at bar. In 1895 that case came to this court, where the decision of the Supreme Court of the state was affirmed. Such affirmance, however, was expressly based upon the principles so established by the state court, which we admit to be the law of the state as to inland waters.

159 U. S. 87.

The limitations found in the opinion of the state court as to reservation, survey and disposal of course apply not only to inland but to international waters.

It will be observed that the cases just considered were all prior to the later decision of the Supreme Court of Michigan in People *vs.* Silberwood (*1896*) (110 Mich. 108), which holds that the La Plaisance case had never been overruled so far as it affects the rights of shore owners on the borders of the Great Lakes, by which the court certainly must have meant the Great Lake system, including the connecting waters.

They were also prior to the decisions to the same effect by the Supreme Court of Michigan in Sherwood

*vs.* Commissioner of State Land Office (*1897*) (113 Mich. 227), People *vs.* Warner (*1893*) (116 Mich. 228) and State *vs.* Fishing and Shooting Club (*1901*) (127 Mich. 580). Certainly if the law of the state is to be applied to this case the later and not the earlier decisions should prevail.

After careful search we have been unable to find any act of the legislature of Michigan or any decision of its supreme court which, properly considered and analyzed, establishes the right of private ownership in the bed of the "outland" or external waters of the State which constitute the boundary between that State and other States or foreign countries.

### (6.) State Decisions—How Far Controlling.

As already shown, the present decisions of the State of Michigan are in harmony with the decision in the Illinois Central case. But even if they were not in harmony, such decisions would not be controlling upon the Federal judiciary in a matter involving the rights of the Government which arose before the existence of the State and did then and do still involve the international obligations of the appellant.

In a case involving the validity of bonds issued by a township under an act of the Michigan legislature, the question arose whether said act was in conflict with the state constitution and how the bonds were affected by the decision of the Supreme Court of the state declaring the statute invalid. Such a case would seem to be peculiarly one in which the decisions of state courts would be followed. But this court held:

"It is insisted that the invalidity of the statute has been determined by two judgments of the supreme court of Michigan, and that we are bound to follow those adjudications. People *vs.* Salem, 20 Mich., 452; Bay City *vs.* Treasurer, 23 Mich., 499. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in 21 States. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal. Gelpcke *vs.* Dubuque, 1 Wall., 175.

"The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the

performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery. Butz *vs.* Muscatine, 8 Wall., 579."

Township of Pine Grove *vs.* Talcott, 19 Wall., 666.

In a case involving submerged lands in New Jersey this court held:

"The effect of this decision by the State court has been a good deal discussed at the bar. It is insisted by the plaintiffs in error that as the matter in dispute is local in its character and the controversy concerns only fixed property within the limits of New Jersey the decision of her tribunals ought to settle the construction of the charter, and that the courts of the United States are bound to follow it. It may, however, be doubted whether this case falls within the rule in relation to the judgments of State courts when expounding their own constitution and laws.

"The question here depends not upon the meaning of instruments framed by the people of New Jersey, or by their authority, but upon charters granted by the British Crown, under which certain rights are claimed by the State, on the one hand, and by private individuals on the other. And if this court had been of opinion that upon the face of these letters patent the question was clearly against the State, and that the proprietors had been deprived of their just rights by the erroneous judgment of the State court, it would perhaps be difficult to maintain that this decision of itself bound the conscience of this court."

Martin *vs.* Waddell, 16 Pet., 417.

To the same effect is the decision of the Circuit Court of Appeals in Scranton *vs.* Wheeler, in which it is held:

"The effect and construction of a United States land patent must, in the very nature of the subject, be a question for the United States courts to determine for themselves, without reference to the rules of construction adopted by the States for their grants. Barney *vs.* Keokuk, 94 U. S., 338; Packer *vs.* Bird, 137 U. S., 661. It is deducible, therefore, from the decided cases:

"Second. That the only reasonable construction to be placed upon the acts of Congress concerning the survey and sale of the public lands, and the settled line of decisions concerning such patents, would be to limit the effect of the patent under which the plaintiff holds to the terra firma bounded by the margin of the St. Mary's river. Railroad Co. *vs.* Schurmeir, 7 Wall., 272; Packer *vs.* Bird, *supra;* Barney *vs.* Keokuk, *supra.*"

Scranton *vs.* Wheeler, 57 Fed. Rep., 811.

In Barney *vs.* Keokuk, *supra*, it was said by this court, regarding the waters of the several States, that "if they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity it is not for others to raise objections." There are three ways in which a State might so resign its rights to riparian proprietors, viz: by the State constitution, by act of the State legislature and by judicial construction. It will not be asserted, we apprehend, that judicial construction is more potent than an act of the legislature. If therefore an act of the legislature, purporting to resign or abdicate such rights, is held to be inoperative and void, as transcending the power of the State and violating the rights of the

people, it must certainly be true that judicial construction to the same effect must likewise be regarded as ineffective to establish a rule of law which accomplishes that result.

In Illinois Central R. R. Co. *vs.* Illinois, 146 U. S., 387, the legislature had granted submerged lands in front of the city of Chicago. It had attempted to "resign" rights in the bed of the waters which belonged to the State in its sovereign capacity. But this court, notwithstanding the fact that the State of Illinois has followed the so-called common law rule as to waters in which the tide does not ebb and flow, held that such an act was beyond the power of the legislature and invaded the rights of the people. Even if, therefore, the line of Michigan decisions should be considered as so "resigning" to riparian owners the rights of the public in the international boundary waters of the State which form a part of the Great Lakes system (which we do not concede), we submit that such decisions should be disregarded, as attempting to do by judicial construction what is beyond the power of any State authorities, legislative, executive or judicial.

In the case in which the Great Lakes were held to be high seas, the decision of the Michigan Supreme Court in People *vs.* Tyler (7 Mich. 161) was expressly overruled by this court, the opinion saying:

"We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the center of the lakes, their character as seas is changed."

It should not be forgotten that the line established by the treaty mentioned by the court runs not only through the Great Lakes but through their connecting passages.

**(7) The Distinction Between Inland Waters of a State and International Waters.**

The court below said:

"In behalf of the complainant it is contended that there is a difference between the land in the bed of the inland rivers of a State and those on its boundary, especially where the boundary is an international boundary, but no substantial ground for such a distinction has been suggested nor can we find any."
Record, 831.

But we submit that a very essential distinction exists, in this: that the waters in the interior of a state concern only the state and its citizens, while waters on the boundary of a border state, adjacent to another nation, concern the whole body of states. Both by the law of nations and by such treaties as the Nation may enter into with such foreign country, it becomes absolutely necessary that, as to such waters, the control should be vested in the Nation and not in the state. While a state may, as said in Barney *vs.* Keokuk, "resign" its own rights in the bed of a stream, it cannot resign the rights of the other members of the family of states constituting the Nation, any more than a partner, who may do what he will with his private fortune, can be generous with the business relations of the partnership.

"Although this power of changing the common-law rule as to streams *within its dominion* undoubtedly belongs in each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water-courses of the country even against any state action."

United States *vs.* Rio Grande Dam and Irrigation Co. 174 U. S. 703.

To the above two limitations, which were all that were necessary to the determination of that case (the case arising from the appropriation of water from a stream at a point entirely within a state or territory of the Union, but affecting the stream where it became an international boundary) must certainly be added a third which is necessary to the present case, viz: that the power of the state to deal with the bed of waters, only one-half of which is within the territorial jurisdiction of the state and where the entire boundary water is free and common, either by the law of nations or by treaty, must be limited by the superior power of the general government to maintain the public character of

such water and to carry out its treaty stipulations with the neighboring nation.

"The powers affecting the *internal affairs of the states* not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and *all powers of a national character* which are not delegated to the national government by the Constitution are reserved to the people of the United States."

Kansas *vs.* Colorado, 206 U. S. 90.

The international character of the waters of the Great Lakes was one of the elements considered by this court, in deciding that such lakes are high seas.

United States *vs.* Rodgers, 150 U. S. 266.

This is in entire accord with the New York cases hereinbefore cited at pages 81 to 85.

**(8) The Question a Political One.**

It is claimed by the appellee that the public character of the connecting waterways of the Great Lakes is limited to an easement, or right of passage, merely for purposes of navigation and commerce. But on the contrary the United States has asserted its right to control such waters, jointly with Great Britain, *for all purposes.* The act of Congress of June 29, 1906, forbids any such diversion of water from the Niagara River, as shall "injure or interfere with the navigable capacity of said river, *or its integrity and proper volume as a boundary stream, or the scenic grandeur of Niagara Falls.*"

34 U. S. Stats., 627.

If the title to the bed of the Niagara River be in the shore owners, such action of the United States is beyond its powers, as it would be an invasion of private rights.

This assertion of control over the connecting waters between the Great Lakes is by the political department of the United States, by the concurrent action of Congress and the President. Similar political action, regarding the straits of St. Mary, are elsewhere noted herein.

"The executive, as a branch of the legislative department, had a voice in determining what these laws shall be. And if it is proper to apply the word 'political' to any department of the government, the Legislature is emphatically the political department."

Words and Phrases, Vol. 6, 5443, citing *in re* Kemp, 16 Wis., 359-396.

Upon political questions the courts will follow the decision of the political departments of the government.

Foster *vs.* Neilson, 2 Pet., 253.

In the above case, decided in 1829, Mr. Chief Justice Marshall rendered the opinion of the court, from which we quote as follows:

"In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the

strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous."

2 Pet., 307.

"It is a sound principle of national law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional power, neither the rights of a State nor those of an individual can be interposed."

Latimer's Lessee *vs.* Proteet, 14 Pet., 14.

Inasmuch as questions of boundary are political ones, in which all courts, both Federal and State, are bound to follow the measures adopted by the government, it follows that, as to all incidental questions pertaining to such boundaries, all courts are likewise bound to follow the principles so established. The intention of Great Britain and the United States in establishing, by treaty or by recognition of the law of nations, the water boundary through the Great Lakes might be defeated, in its most important elements, if such intention may be overborne by decisions of state courts.

Riparian rights are an incident of shore title, and the determination of such rights along the margin of

an international boundary stream clearly involves the determination of rights arising under the boundary itself. Not only have the treaty-making power and the President and Congress recognized the paramount control, by the Nation, of the beds of all the boundary waters between Great Britain and the United States, but the government of the United States is asserting the same principle, through its political department, in bringing and prosecuting the present suit.

In view of the above, we submit that this court should follow the policy adopted by the United States with regard to these international boundary waters.

A similar situation has arisen regarding the waters of the Rio Grande, forming the international boundary between the United States and Mexico.

By the seventh article of the treaty between the United States and Mexico of February 2, 1848, (9 U. S. Stats. 928) it was provided that:

"The River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. . . . The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits."

By the fourth article of the Gadsden treaty of December 30, 1853, (10 U. S. Stats. 1034) it was provided that:

"The several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty, that is to say, below the intersection of the 31 degree 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe."

On December 26, 1890, a convention was concluded between the United States and Mexico (26 U. S. Stats. 1512) which provided for an international boundary commission, to which was given, by article five, the power to inquire, upon complaint of the local authorities, whether works were being constructed in the Rio Grande prohibited by any prior treaty stipulations.

On May 24, 1897, the United States filed a bill in equity against the Rio Grande Dam & Irrigation Company, the purpose of which was to restrain the defendant from constructing a dam across the Rio Grande river in the Territory of New Mexico (not in the international boundary waters) and appropriating the waters of that stream for the purposes of irrigation. The bill averred that the purpose of the defendant would interfere with the navigable capacity of the Rio Grande, in violation of the treaty stipulations in reference to the navigability of the Rio Grande in that

portion of the river which formed a boundary between the two nations.

The case came to this court and was decided May 22, 1899, and is reported in 174 U. S. 690. The opinion of the court says that it does not appear that any action by the international commissioners had been invoked by the local authorities and held that, as the case was then presented, it was not necessary to consider the treaty stipulations (*although "such questions might under some circumstances be interesting and important"*) (page 700), because if the proposed dam and appropriation of the waters, entirely within the limits of New Mexico, constituted a breach of said treaty obligations or of international duty to Mexico, they also constituted an equal injury and wrong to the people of the United States which the government of the United States had full power to correct under existing law. The court therefore ordered further inquiry as to whether the intended acts of the defendant would substantially diminish the navigability of the river and directed the court below, if so found, to enter a decree restraining those acts.

174 U. S. 710.

The case again came before this court and was decided on March 3, 1902, (184 U. S. 416) and it was held that because of the absence in the record of material evidence, by which injustice might result, such absence being due to the action of the trial court in not giving time to the government to prepare its case in a matter of great importance the cause should be

remanded, without considering the merits, with leave to both sides to adduce evidence.

United States *vs.* Rio Grande Dam & Irrigation Company, 184 U. S. 425.

On May 21, 1906, a convention was entered into between the United States and Mexico, of May 21, 1906, intended "to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto."

34 U. S. Stats. 2953.

By Article I of said convention it was provided that:

"After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exist above the city of Juarez, Mexico."

By Article II it was provided that "the delivery of the said amount of water shall be *assured* by the United States and shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas," according to a schedule included in the convention.

By Article III it was provided that:

"The said delivery shall be made without cost to Mexico, and the United States agrees to pay the whole

cost of storing the said quantity of water to be delivered to Mexico, of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond the delivering of the water in the bed of the river above the head of the Mexican Canal."

By Article IV it was provided that said delivery of water is not to be construed as a recognition by the United States of any claim on the part of Mexico to said waters, that Mexico waives all claim to the waters for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and all claims past, present and future, against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico by reason of the diversion by citizens of the United States of waters of the Rio Grande.

By Article V the United States disclaimed the recognition of any legal basis for the claims referred to in Article IV and disclaimed any concession of the establishment of any general principle or precedent by the concluding of the treaty. Article V also defines the scope of the treaty as extending "only to the portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman."

Here, by express treaty, a distribution has been established of the waters of an international boundary stream without regard to the laws of one of the territories of the Union. Can it be contended that, when New Mexico becomes a state, her local laws as to the use of the waters of the Rio Grande shall prevail as

against the international obligations of the United States?

Such distribution has also been established, by action of the national government, affecting the international river that forms the boundary of Texas, one of the existing states of the Union. Should controversy arise, can it be doubted that any rule established by Texas, whether by legislation or by court decisions, must yield to the higher right of the Nation, or that, if necessary, a different rule would be applied in this court from the rule governing interior waters of the State?

## E.

### Former Construction by the Government.

The Executive Departments of the United States for more than a hundred years have regarded and treated the islands lying in the water communication between Lake Superior and Lake Huron as separate and distinct from the mainland, and as not affected by any riparian rights attaching to the mainland. Reservations for public purposes have been made in those waters in this very township.

> President's letter, September 22, 1885, reserving Islands A to L. (record, 190.)

And this was done irrespective of titles previously granted to the adjacent surveyed lands on the margin of the waters.

> Patent to Brockway, February 1, 1849. (record, 758-759.)
>
> Patent to O'Jibway, April 15, 1884. (record, 759-760.)

See also the specific reservation of October 12, 1889, reserving Islands 1 and 2, here in controversy, after the date of the patent to Chandler, (record, page 213) although said reservation was unnecessary, because, as claimed by appellant, said islands had already been reserved at least as far back as 1847.

Record, 188-189.

Islands A to L, above referred to, are situated in the same waters and in the same township as Islands 1 and 2, here in controversy. By comparing the official plat of said township 47 north, range 1 east (bound volume constituting complainant's exhibit 3), with the map constituting complainant's exhibit 34, it will be observed that Islands A to L were not surveyed at the time the public survey was made of this township. According to appellee's contention, therefore, said Islands A to L passed to the owners of the adjacent shore and the reservation by the President, for the purpose of improving these great navigable waters, was without effect.

Many of the islands embraced in the reservation so established have since been occupied and used by the Government for carrying on great public works and if it now be held that such reservations were without authority of law, and were therefore null and void, the damage to the interests of the Government cannot well be calculated. If such a declaration goes forth, clothed with judicial authority, it is very certain that the owners of adjacent shores will not delay to take advantage of the alluring opportunity to reap a harvest therefrom at the expense of the Government. While

this consideration cannot justify an erroneous decision upon a question of law, yet it does justify and demand great caution before overturning the precedents and practice of so many years.

The "water communication" in question contains a very large number of islands which were not surveyed at the time of the public surveys of the townships in which they are situated.

> See particularly the surveys and plats of Townships 47 North, Range 1 East, 44, 45, 46 and 47 North, Range 2 East, and 43 North, Range 3 East. (Complainant's Exhibit 3.)

The legal status of the islands in the Straits of St. Mary depends upon the construction of the treaties with Great Britain, the Ordinance of 1787, the cession from Virginia, by which the United States acquired both sovereignty of the region and title to the public lands therein, and of the Act of January 26, 1837, admitting Michigan to the Union and vesting the sovereignty in that State. Those legislative Acts, while of extraordinary dignity and importance, are subject to the same rules of construction as other legislative Acts. And it has been uniformly held that a long-continued construction under an Act, by those concerned in the administration of rights dependent thereon, becomes as much a part of the Act as if that construction had been specifically set out therein.

The same principles are applicable to the construction of the treaties as to the construction of the legislative acts.

"A Treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the Treaty for a rule of decision for the case before it as it would to a statute."

Head Money Cases, 112 U. S., 580.
United States *vs.* Rauscher, 119 U. S., 407.
*Ex parte* Cooper, 143 U. S., 472.

So, the acts of Congress and of the Executive Departments, construing rights acquired under a treaty, may be considered in determining those rights and as showing a uniform construction by those branches of the Government.

New York Indians *vs.* United States, 170 U. S., 1, 30, *et seq.*

In 1827 it was held:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

Mr. Justice Trimble in Edwards' Lessee *vs.* Darby, 12 Wheat., 210.

In 1832 Mr. Justice Story said:

"It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates, as well of deceased

persons as of persons insolvent, who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would of itself furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

United States *vs.* State Bank of North Carolina, 6 Peters, 39.

"While, therefore, the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and the Executive for so long a time."

Mr. Chief Justice Waite in United States *vs.* Pugh, 99 U. S., 265.

"Since it is not clear that that construction was erroneous, it ought not now to be overturned."

Mr. Justice Harlan in United States *vs.* Philbrick, 120 U. S., 52.

"It is interesting to note the growth of this principle in our law. From the time Justice Trimble announced it so cautiously in 1827 it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice every judge who has taken it up has stated it more strongly than it was stated before."

Mr. Justice Brewer in United States *vs.* Railway Co., 37 Fed. Rep., 551, 556.

But the present case is even stronger. The language of the treaties with Great Britain and of the arbitration decision of the Commissioners thereunder, constituting a part thereof, leave no doubt that these islands are situated in public waters. There can likewise be no doubt that the act of 1837 conferred the sovereignty of the waters in which they lie upon the State of Michigan. Nothing is left, therefore, for construction, and the principles established in Illinois Central Railroad *vs.* Illinois apply with full force and fix the ownership of the soil under the waters in the State of Michigan, leaving the title to Islands 1 and 2 in the United States.

We assume that the appellee will rely particularly upon the decision of this court in 1895, in Grand Rapids & Indiana Railway Company *vs.* Butler (159 U. S., 87). But that decision related to an unsurveyed island *in an inland river* of the State of Michigan, forty miles from its mouth, and not to international boundary waters. The case has since been distinguished by the Circuit Court of Appeals for the Eighth Circuit in Harding *vs.* Minneapolis Northern Railway Company (84 Fed. Rep., 287). In that case, as in the one at bar, an island was not surveyed because it adjoined a reservation, and the Court of Appeals held:

"It may be conceded to be the general rule that where a government survey along the banks of a navigable stream is made, and the banks of the stream are meandered, but the survey fails to disclose a small island contiguous to the shore, the riparian proprietor holding the adjacent shore land under a grant from the government is entitled to such land as appurtenant to the grant. This rule rests upon the ground that the

failure to survey small islands contiguous to either shore is evidence of an intent on the part of the government to surrender all claim thereto in favor of the adjoining riparian proprietors. Railroad Co. *vs.* Butler, 159 U. S., 87, 15 Sup. Ct. 991; Butler *vs.* Railroad Co., 85 Mich., 246, 48 N. W. 569; Middleton *vs.* Pritchard, 3 Scam., 510, 520; Hardin *vs.* Jordan, 140 U. S., 371, 11 Sup. Ct., 808, 838. But as the rule last mentioned for the construction of grants is founded upon the presumed intent of the government to relinquish its title to islands which are contiguous to the bank of a stream, and are not surveyed or platted, the rule in question ought not to be applied when the circumstances are such as to rebut that presumption. If, when the bank of a stream is surveyed and meandered, good reasons exist for not indicating on the survey the existence of an island contiguous to the shore, the mere failure to indicate it ought not to be given the effect of divesting the government of its title thereto. In the case at bar we think that reasons did exist when the first survey was made for not platting Boom Island, and that they are sufficient to overcome the presumption, which would otherwise arise from the survey, that the government intended to relinquish its title to the island."

84 Fed. Rep., 291.

As will appear hereafter, a similar reason exists by reason of reservation for public uses, why there can be no presumption that the United States intended, by omitting Islands 1 and 2 from the survey, to relinquish its title thereto.

## II.

## TITLE TO ISLANDS 1 AND 2 IN THE UNITED STATES.

That the title to these islands was at one time vested in the United States is beyond all controversy. They formed a part of the territory conceded by the treaty of Paris in 1783 to belong to one or more of the revolted colonies, the thirteen original States. Later Virginia ceded the territory northwest of the Ohio river, of which these islands were a part, to the United States and thereafter the United States held the *sovereignty* over said territory in trust for the future States to be created therefrom.

Ordinance of July 13, 1787.

Illinois Central Railroad Company *vs.* Illinois, 146 U. S., 387.

The United States also held the *title* to the public lands in the northwest territory, for the common benefit of the several States, and, when any part of the territory became incorporated in a new State, continued to hold the title "by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new States, for that particular purpose."

Pollard *et al. vs.* Hagan *et al.*, 3 How., 224.

Prior to the creation of the State of Michigan, in 1837, therefore, the United States held title to the

islands as proprietor and title to the waters and subaqueous lands around said islands by virtue of its sovereignty. By the creation of the State of Michigan such concurrent ownership was divorced, the United States retaining title, as *proprietor,* to these and all other islands then existing in the waters in question and the State acquiring title as a *jus publicum,* by virtue of its newly created sovereignty, to the surrounding waters and to the soil underneath such surrounding waters.

The United States does not now, therefore, claim title to Islands 1 and 2 by virtue of its sovereignty but only by virtue of its original proprietorship, with which it has never parted. The islands remained, and still remain, a portion of the public lands of the United States, subject to disposal at such time only as the United States shall see fit, if ever, to dispose of them, but never to be disposed of by mere inference or implication.

It is not inconsistent with the rights of the public in the navigable waters that the United States, if it should so desire, may sell or otherwise dispose of these or any other islands in the Great Lakes or in their connecting waters. Indeed, islands and portions of islands in such waters have been sold or otherwise disposed of by the United States to private parties, as a part of the public lands of the United States subject to such disposal. But in all such cases there has been a definite grant or patent specifically carrying the title to such islands and they have not passed as appurtenant to any title on an adjacent shore.

But, as to many islands in these waters, including Islands 1 and 2, it has been the policy of the United

States not to dispose of the islands to private persons but to hold them in a state of reservation for public uses.

The United States continued to hold title to Islands 1 and 2 exactly as such title would be held by a private person and the present suit to quiet the title thereto is exactly such a suit as would be brought by a private person whose title is threatened by a claim of adverse title.

The validity of the shore title only comes into this case because the appellee claims that its alleged shore title runs along the bed of the waters to the thread thereof, rising up from such bed and including title to the islands found between the shore and the thread of the waters. Of course the general rule was and is that in private waters the riparian owner, taking title to the thread, owns the islands up to that line. In public navigable waters the sovereign has always owned the islands (until disposed of) as private proprietor, which was part of the *jura regalia,* and the submerged lands surrounding them in right of sovereignty and in trust for the public, which was the *jus publicum.* The *jus privatum* was the riparian owner's right of access and wharfage, so far as consistent with the public trust.

But, as stated above, when the United States, in 1837, parted with the *jus publicum* it did not part with the *jura regalia* or "crown lands." The State of Michigan acquired no title to public lands by virtue of its creation into a new sovereignty, and has never since acquired a foot of public lands within its borders, theretofore belonging to the United States, except by special and

specific grant from the United States. No such grant of Islands 1 and 2 has ever been made.

The islands were in existence prior to the creation of the State of Michigan, and therefore did not pass to the State.

See map No. 2, accompanying report of Commissioners under Treaty of Ghent, entitled "Continuation of the river Saint Marie," in bound volume constituting complainant's exhibit 5.

See also

Testimony of Spalding, record, 199.
Testimony of Stradly, record, 205.
Testimony of Ripley, record, 235.

Unless the United States has specifically parted with its title to the islands the title to them still remains in the United States as proprietor, since the patent to Chandler, covering the adjacent shore, did not specifically include them. Even if the shore title acquired by the Chandler patent were valid, it stopped at the water's edge.

Scranton *vs.* Wheeler, 57 Fed. Rep., 811.
Shively *vs.* Bowlby, 152 U. S., 45.

The fact that the obstructions erected in the waters between said islands and the shore have been so erected under authority of a revocable license granted by the War Department, which is by its terms temporary in character, does not affect the conclusions to be drawn from what has been said above. Such licenses by the United States merely amount to a declaration that the particular structure, in the particular place and on the

date stated, do not interfere with navigation. Inasmuch as the United States does not own the bed of the waters, the effect of the license goes no further than that passive consent.

The erection of a structure in navigable waters within the limits of a State depends upon the concurrent or joint assent of both the national government and the state government. Without the consent of the Secretary of War no structure can be erected in such waters but the right to do so depends also upon the assent of the State.

Cummings *vs.* Chicago, 188 U. S., 431.

The objection herein raised by the Government against the ownership by the appellee of Islands 1 and 2 does not depend upon the inconsistency with the public interest of private ownership of islands in such waters, where private title has been acquired thereto, but upon the inconsistency with the public interest of such title being acquired by virtue merely of alleged ownership to the bed of the waters themselves, such sub-aqueous ownership being incompatible with the public interest.

Furthermore, the appellee has not acquired title to these islands, unless by its claim of ownership of the soil under the waters themselves, and the Government has need not only of said islands, the title to which it has not parted with, but is also face to face with a need for all the space between the shore and the thread of the waters for its great artificial aids to navigation, which are in the interest of national and international commerce and of all the people of all the States.

## III.

## THE ISLANDS AND ADJACENT SHORE LAND RESERVED FOR PUBLIC USES.

### A.

### Historical Statement and Authorities.

The appellant contends that the land patented to William Chandler in 1883, under whom the appellee claims, was not subject to such transfer of title from the United States, because at the date of said patent, and long prior thereto, said land was embraced in a reservation by competent authority for public uses of the United States, and that, therefore, the appellee has no title to the shore to which riparian incidents could attach, and that, therefore, for this reason alone, the appellee can have no title to Islands 1 and 2.

Such reservation was, at the date of William Chandler's application to locate the land embraced in his patent and at the date of said patent, a matter of record in the public offices of the United States at Washington. He, his grantees, and all other persons were bound to take notice of the status of said land, as shown by such public records, and to construe correctly the legal effect of said records as affecting the status of said land.

Gleason *vs.* White, 199 U. S., 62.

Ignorance of those records, or of any portion of them, or misconception of their legal effect, adds nothing to the strength of a paper title in the hands of Chandler or his grantees, and if such records, properly

construed, show the tract applied for and patented to have been in a state of reservation and not subject to disposal under the public-land laws, any paper title issued therefor by any officer of the United States is not merely voidable but void.

A large amount of documentary and record evidence from the public archives at Washington, Lansing, and Sault Ste. Marie has been introduced in evidence, which shows the inception and continuance of the reservations and the constant purpose of the officers of the United States Government, from 1822 to the present date, to maintain the lands along the south shore of the strait of St. Mary, opposite Islands 1 and 2, now in controversy, in a state of reservation for great public uses, viz., the complete control of such lands for present and future needs of the great works in aid of commerce which the United States has constructed at that place.

During part of the time since 1822 a portion of the land so reserved, including the land embraced in the patent to Chandler, was also used to carry out the obligations of the United States with the Chippewa tribe of Indians, in order to provide for them a place for fishing and encampment, as set out in Paragraph VI of the bill.

Record, 5, 6.

Such occupancy by the Indians was, however, in the nature of an easement existing upon the land so reserved, the title remaining in the United States as proprietor and the land so occupied being continuously within the larger reserve for public uses.

A portion of the land embraced in some of the successive reservations was also devoted by the United States to the purposes of military defense, and a fort, known as "Fort Brady," was there established. The portion so devoted to military defense was, by various official acts, curtailed to a small tract of less than 40 acres, lying to the eastward of the Government's ship canal and locks, but the reservation for public uses of the remaining lands was continued.

The reservation, extending four miles along the south shore of the river, or strait, was first established in 1822. It extended two miles above and two miles below the military post or fort known as "Fort Brady," and ran back into the interior for four miles.

Record, 92, 93.

The public-land surveys of the United States had not at that time reached the region in question, but were extended over this township in 1845.

Record, 96-122.

Prior to the extension of the public surveys to this point, the military officers of the United States made a survey of the Fort Brady military post, which was afterwards separately laid off on the public-land surveys and plats.

Record, 305, 197, 198.

Such survey of the military post, however, was for military purposes only, and made no diminution in the larger reservation for public uses which had been already established.

Record, 95.

The original reservation in 1822 was, a shown by the record, established by General Scott. It does not appear whether this was done by authority of the Secretary of War or the President of the United States and therefore it is not clear that such reservation had legal effect as the act of the President. However that may be, the reservation was established, or attempted to be established, in pursuance of a wise and well-defined policy of preserving the lands along the rapids for public purposes, in aid of the commerce of the region, free from the intrusion of individuals.

Such policy is well expressed in the letter written on December 11, 1846, by General Brady, in military command of that region, to the Adjutant General at Washington, as follows:

"I believe that the best interest of the Government and that of the community at large would be benefited by the Government not offering for sale any of the lots fronting on the line of the canal, from the reserve to the head of the rapids, believing, as I most assuredly do, that the day is not far distant when a canal will be made there, if not by the General Government by Michigan and the adjoining States. The quantity of land that it will require to receive the rocks and other materials that will be taken out of a ship canal there no one can know, and until the canal is made those lots had better remain with the present owner.

"*Should they go into the hands of individuals before this canal is completed great would be the expense to get back the land necessary for the completion of this important work.*"

Record, 197.

At the present moment the very shore land here under consideration is necessary for the natural development of the "important work" in question, for which Congress appropriated at its last session *five million dollars.*

34 U. S. Stats., 1098.

House Document No. 333, 59th Congress, 2d Session, and accompanying map, reproduced at the end of this brief.

Such policy has continued until the present time. In the year following General Brady's letter above quoted a definite reservation was established by the President, under special authority of Congress, which reservation included the shore land claimed by the appellee herein.

By act of Congress approved March 1, 1847, the lands in said Township forty-seven North, Range one East, were included in the Lake Superior Land District thereby created, and a Land Office was established for the sale of the lands in said district. By the second section of said act all the lands in said district were opened to sale in the same manner as other lands under the laws then in force for the sale of public lands, excepting section sixteen in each township for the use of schools *and such reservations as the President should deem necessary for public uses.*

9 U. S. Stats., 146.

On April 3, 1847, the President, at the request of the Secretary of the Treasury, reserved many tracts of land in the northern peninsula of Michigan until in-

vestigation could be made as to the necessity of their permanent reservation.

Record, 137, 138 (Complainant's Exhibit 11, including map.)

Addition to transcript of record, Map 2.

This reservation included the entire north half of the township in question.

Investigation as to the necessity of continuing, as permanent reservations, the tracts so temporarily reserved proceeded during the following summer. The correspondence attending such investigation is shown in Complainant's Exhibit B.

Record, 806-808.

Addition to transcript of record, Map 3.

It resulted in the reservation by the President on September 2, 1847, of fractional sections 1 and 2, of township 47 north, range 1 west, in addition to fractional sections 4, 5 and 6 of township 47 north, range 1 east, which had been previously reserved by the President's order of April 3, 1847.

Complainant's Exhibit B, (record, 806-808).

Addition to transcript of record, Map 3.

The reservation so established, as will be seen by referring to the plat forming a part of Exhibit B, covered the entire south shore of the Strait of St. Mary at the rapids, extending nearly four miles along the margin of the water and embracing a sufficient quantity of land to meet the needs of commerce both then and in the future.

Addition to transcript of record, Map 3.

Islands 1 and 2, here in controversy, are situated in said section 6 and were therefore included in the reservation, as was the adjacent shore.

The reservation so established by the President on September 2, 1847, was a specific reservation *for public uses*, contemplated by the second section of the act of March 1, 1847, *supra*, and was therefore, by said executive act, carved out of the general temporary reservation, (so far as it was embraced therein) which had been established by the President on April 3 of the same year. When, therefore, the lands embraced in said general temporary reservation which were not found to be permanently needed came to be released from reservation, on December 9, 1852 (record, 161-163), the land embraced in such specific reservation was not affected by the order of restoration.

On September 26, 1850, Congress passed an act to settle land titles at Sault Ste. Marie, as set out in Paragraph IX of complainant's bill (record, page 9). As a necessary preliminary to the adjustment of said titles, the act provides:

"That the said Commissioner shall cause the register and receiver to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie, and it shall be the duty of the Secretary of War to direct the proper military officer, on the application of the register and receiver, to designate, or cause to be designated, upon the map aforesaid, the position and the extent of lots necessary for military purposes, as also the position and the extent of any other lot or lots, which may be required for other public purposes, and also the position and extent of the Indian agency tract, and of the Indian reserve."

9 U. S. Stats., 469-470.

In pursuance of the duty so imposed upon him, the Commissioner of the General Land Office furnished the register and receiver and the Secretary of War, on August 14, 1851, with the required map.

Record, 139. Complainant's Exhibit 13.

Record, 146. Complainant's Exhibit 14, with map.

Addition to transcript of record, Map 4.

Thereupon the Secretary of War caused an investigation to be made by his officers, and on March 10, 1852, in accordance with their report designated on a map marked "No. I," for a permanent reservation, the north fractional half of section 6, including the shore land claimed by the appellee.

Record, 146, 147, and 148. See map showing line C A H, Complainant's Exhibit 15.

Addition to transcript of record, Map 5.

Such designation was not only for purposes of Fort Brady, but for "other public purposes."

Later, on August 5, 1852, on the urgent request of residents of Sault Ste. Marie, the Secretary of War reduced the reservation established by him under the act of 1850 on March 10, 1852, by moving the south line thereof northward so as to include only the lands north of a line designated as A, E, F, G upon a map known as "No. II."

Complainant's Exhibit C, with map.

Record, 808-814.

Addition to transcript of record, Map 6.

This was done after most careful investigation by the military officers of the Government.

Record, 152-155.
Record, 808-814.

The final reservation so established by the Secretary of War in pursuance of the duty imposed upon him by the act of 1850 has never been modified or abrogated by him or by the President or by Congress, and the land north of the line E, F, G remains to this day in a state of reservation for public uses. *Said line is the southern boundary of the existing canal reservation at Sault Ste. Marie.*

See testimony of Joseph Ripley, superintendent of the canal and locks at Sault Ste. Marie.
Record, 237.

Attention is particularly called to said "Map No. II," showing in blue color, as prepared by the military officers of the United States, the land so reserved for public purposes, entirely distinct and apart from the land reserved for the military post of Fort Brady, which lies to the eastward thereof and disconnected therefrom.

Complainant's Exhibit C, record, 153 to 156.
Addition to transcript of record, Map 6.

The limits of said *military post or fort* were afterwards reduced by the Secretary of War at the urgent insistence of residents of the town, but that has nothing to do with the reservation for public purposes.

Meanwhile, investigation had been proceeding as to

the necessity for permanently reserving the many tracts in the Northern Peninsula of Michigan, which had been *temporarily* reserved by the President on April 3, 1847, and on April 30, 1852, the Commissioner of the General Land Office wrote to the Secretary of the Interior inquiring what portion of said tracts would be needed by the Treasury, War, Navy and Interior Departments.

Record, 740.

Thereupon, on May 7, 1852, the Secretary of the Interior wrote to the Secretary of War enclosing said letter by the Commissioner and inquiring what portion of said *temporarily reserved tracts* would be needed by the War Department.

Appendix to this brief, xxvii.

To this the Secretary of War, after investigation by his officers, replied on May 25, 1852, that no reservation would be required by his Department within the region embraced by the maps submitted, "except that at Fort Brady."

Record, 152.

Appendix to this brief, xxx.

By this the Secretary of War clearly meant both the reservation for the military post *and the neighboring reservation for public uses*, for it is inconceivable that he could not have meant to include the reservation for public uses, in view of his subsequent letter of August 5, 1852, already referred to.

Record, 152-155.

Record, 808-814.

On May 26, 1852, the Secretary of the Interior wrote to the Secretary of the Treasury and on June 14, 1852, to the Secretary of the Navy, making similar inquiries.

Appendix to this brief, XXVIII and XXIX.

On June 24, 1852, the Secretary of the Navy replied that his Department needed none of the lands in question.

Appendix to this brief, XXX.

On June 11, 1852, the Secretary of the Treasury replied enclosing a detailed list of such portions of the general temporary reservation of April 3, 1847, as the Treasury wished should be retained as sites for light-houses, such selection having been made by the light-house board after a careful examination.

Appendix to this brief, XXXI and XXXII.

On July 2, 1852, the Secretary of the Interior sent to the Commissioner of the General Land Office the above replies from the three Departments.

Appendix to this brief, XXXIII.

Thereupon the Commissioner of the General Land Office on December 2, 1852, enclosed a list of the particular tracts recommended by the Secretary of the Treasury to be permanently reserved for light-house purposes, and recommended that the balance of said lands, "except the military reserve *at* Fort Brady," be released from reservation, for which purpose he had prepared an order at the foot of the list for the President's signature.

Record, 161.

On December 9, 1852, the Secretary of the Interior returned said enclosures to the Commissioner with the President's order, bearing the same date, endorsed thereon as recommended, by which said lands desired for light-house purposes were reserved and "all the remaining lands situated in the tracts which were **temporarily** reserved for 'public uses' in the year 1847, (except the military reservation *at* Fort Brady)" were released from reservation.

Record, 161-163.

By the reservation *affected by said order*, so described by the Commissioner as "the military reserve **at** Fort Brady" and by the President's order as "the military reservation *at* Fort Brady" was evidently intended the entire reservation at that point which had been included in the *temporary* order of withdrawal of April 3, 1847. Such reservation is shown on the map accompanying said order of withdrawal, including the entire north half of this township, and *was colored green* in the map accompanying said withdrawal.

Addition to transcript of record, Map 2.

That this was the understanding is shown by the letter of the Commissioner of the General Land Office to the register and receiver at Sault Ste. Marie, of June 9, 1853.

Record, 741.

That the reservation north of the line E, F, G, for public purposes, still continued and was not included in the President's release of certain reservations on

December 9, 1852, appears also by the letter from the Commissioner of the General Land Office to the Secretary of the Interior on May 4, 1857, regarding such release, in which he says that in consequence thereof the lands embraced in the reservation of April 3, 1847, and released on December 9, 1852, were on May 18. 1853, proclaimed to be "offered at public sale to commence on Monday, September 5, 1853."

Record, 796.

The President's proclamation referred to is in evidence as Complainant's Exhibit 73, and reference to it will show that it does include the north half of township 47 north, range 1 east, on the mainland *except* sections 4, 5, and 6, which had been included in the *specific reservation* of September 2, 1847, and which section 6 contains the reservation for public uses referred to.

Record, 797, and particularly 800.

On April 4, 1853, the register and receiver at Sault Ste. Marie reported their adjudication of private titles under the act of 1850, in which they state that they have confined their adjudications to lands outside of the military post, the Indian agency reserve and the Ste. Marie canal reservation of 400 feet in width.

Record, 666.

It appears, however, that by some mistake the register and receiver did pass upon a very few claims asserted north of the line E, F, G, in the triangular tract of land south of the so-called Indian reserve and

north of the 400-foot strip for which an easement was granted to the State of Michigan for canal purposes by the act of August 26, 1852. The only explanation of this is that the register and receiver mistook said easement for the reservation established by the Secretary of War under the act of 1850. This mistake and the adjudication of the few claims so involved and the later issue of patent to Chandler in 1883 for a portion of the lands north of the line E, F, G are, so far as counsel for appellant are advised, the only variations by the executive officers of the United States from the consistent maintenance and preservation of the reservation for public uses north of said line, and it is noteworthy that in such mistakes or inadvertences the Secretary of War, to whom, and to whom only, had been confided the duty of establishing said reservation, did not participate. On the contrary, the record shows that the Secretary of War and his military officers have consistently and persistently made every attempt to maintain the original reservation for public uses, as finally established on August 5, 1852, in its entirety and integrity.

It is likewise true that after Chandler made his application, in 1881, the War Department and its officers, startled by the threatened loss to the canal of lands which the War Department had always regarded as permanently reserved, took prompt steps to reserve again everything possible in the original reservation that had not been disposed of to Chandler by the inadvertence of the officers of the Interior Department.

Speaking of the Chandler application, Major Weitzel

wrote to the Chief of Engineers on June 6, 1881, as follows:

"As the object of such purchase can only be to speculate upon the supposed future needs of the Government in connection with the work, I respectfully suggest that the President be requested to withdraw this strip from the market and reserve it for canal purposes."

Record, 785.

Thereupon, on June 14, 1881, the Secretary of War wrote to the Secretary of the Interior as follows:

"I have the honor to enclose herewith a communication from Major G. Weitzel, Corps of Engineers, dated the 6th instant, reporting that parties are attempting to buy the strip of land north of the St. Mary's Falls Canal, Michigan, and between there and the rapids. The map accompanying the report of the Chief of Engineers from 1878, referred to by Major Weitzel, is also enclosed, the land in question being shaded in blue.

"In accordance with the recommendation of the Acting Chief of Engineers in his endorsement on said communication, I beg to request that if this land is open to reserve that it be temporarily declared and set apart for the purposes of said canal, until the usual order of the President can be obtained."

Record, 180.

The defendant offered in evidence, in contravention of the foregoing, a decision by the Commissioner of the General Land Office, on December 21, 1895, approving a location by John Torrent of fractional quarter section 2, township 47 north, range 1 *west*, such decision holding that said land, although embraced in the reserva-

tion of September 2, 1847, was no longer therein and was subject to disposal under the public-land laws.

Record, 322.

Whereupon the complainant offered a former decision by the Commissioner in the same case, dated July 17, 1894.

Record, 765.

The significance of the above is that said last named decision showed a present desire on the part of the land officials to maintain as reserved for public uses not merely the line north of A, E, F, G, but the whole five sections of land running along the rapids and the westerly approach thereto, shown in Addition to record, Map 3.

It is true that by said decision offered by defendant the land officials receded from this view and held that the tract applied for by Torrent was not within the existing reservation for *Fort Brady;* but the decision was devoted to considering the reservation for the *military post* and not that for *public uses,* and the tract applied for by Torrent is situated more than two miles to the west of the tract reserved on August 5, 1852, which is north of the line A, E, F, G.

On August 26, 1852, Congress passed an act granting to the State of Michigan "the right of locating a canal *through* the public lands known as the *military reservation* at the falls at St. Marys River in said State," such grant being a strip 400 feet in width, extending along the line of the proposed canal.

10 U. S. Stats., 35.

It is public knowledge that the War Department has control and supervision of engineering works in aid of navigation, and the legislation just cited, therefore, emanated from the War Department, the head of which had, *twenty-one days previously*, established the reservation as existing north of the line A, E, F, G. Particular attention is called to the fact that said act recognizes the reservation for public uses and locates the canal *through* it, but does not restore to the public domain, for disposal, those portions thereof lying outside of said 400-foot strip. The "miltary reservation" mentioned in the act could not be the special reservation for the post called Fort Brady, because the line of the canal does not touch that reservation.

The grant to the State of Michigan was not a grant of title, but was merely an *easement* through the reservation, the title to which still remained in the United States as proprietor. Such grant also was a mere trust, for which the State of Michigan later had to account to the United States.

United States *vs.* State of Michigan, 190 U. S., 379.

One of the leading cases on the subject of reservations is Wilcox *vs.* Jackson, 13 Peters, 498, involving the military reservation at Fort Dearborn, in Chicago. In that case this court held that the act of the War Department in making a reservation is, in legal effect, the act of the President, and that lands so reserved are not subject to disposal under the public-land laws. If the land officials, says the court, "undertake to grant pre-emptions in land in which the law de-

clares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction; as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum."

13 Peters, 511.

In that case also the reservation was made in accordance with an act of Congress, just as in this case the reservation was finally established by the Secretary of War in accordance with the act of 1850. The court proceeds:

"If the party claiming the pre-emption right here were to succeed, together with the land, he would recover all the improvements made upon it at the public expense. The light-house and improvements alone, it seems by reference to the act making an appropriation for its erection, cost $5,000. How much was expended in the buildings at the military post we have no means of knowing, but probably a considerably larger sum. Thus, besides the land purchased for the (sum) of $94.61 he would recover property, and that, too, property necessary for the military defense and commerce of the country, which cost the United States many thousands of dollars; and if there had been expended upon it as many hundreds of thousands as there have been thousands the same result would follow. A principle leading to such startling consequences cannot, in our opinion, be a sound one. The right of pre-emption was a bounty extended to settlers and occupants of the public domain. We cannot suppose that this bounty was designed to be extended at the sacrifice of public establishments or great public interests."

*Id.*, 514.

In Burfenning *vs.* Railway Co., 163 U. S., 321, the court says:

"It has undoubtedly been affirmed over and over again that in the administration of the public-land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact *not resting on record*, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. Johnson *vs.* Towsley, 13 Wall., 72; St. Louis Smelt. & Ref. Co. *vs.* Kemp, 104 U. S., 636; Steel *vs.* St. Louis Smelt. & Ref. Co., 106 U. S., 447; Wright *vs.* Roseberry, 121 U. S., 488; Heath *vs.* Wallace, 138 U. S., 573; McCormick *vs.* Hayes, 159 U. S., 332.

"But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department can not override the expressed will of Congress or convey away public lands in disregard or defiance thereof. St. Louis Smelt. & Ref. Co. *vs.* Kemp, 104 U. S., 636, 646; Wright *vs.* Roseberry, 121 U. S., 488, 519; Doolan *vs.* Carr, 125 U. S., 618; Davis *vs.* Wiebbold, 139 U. S., 507, 529; Knight *vs.* United Land Asso., 142 U. S., 161.

"The case of Morton *vs.* Nebraska, 88 U. S., 21 Wall., 660, is very closely in point. In that case the

plaintiff held a patent for lands in Nebraska which were saline lands, and noted such on the field books, although the notes thereof had not been transferred to the register's general plats. The pre-emption act of September, 1841, 4 Stat. L., 556, declared that 'no lands on which are situated any known salines or mines shall be liable to entry.' Notwithstanding this prohibition patents were issued for the lands, and it was held that they were *absolutely void*, the court saying, page 674: 'It does not strengthen the case of the plaintiffs that they obtained certificates of entry and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law.'

"In that case it will be observed that the records disclosed that the lands were saline lands when the proceedings in the land department were had. So the case was not one in which the department determined a fact upon parol evidence, but one in which it acted in disregard of an established and recorded fact. In Root *vs.* Shields, Woolw., 340, decided by Mr. Justice Miller at the circuit, it was held that a patent for lands within the limits of the city of Omaha was void. It is true that case was one in equity and not in law, but so far as respects the decision that the patent was void it is exactly in point."

In Stone *vs.* United States, 2 Wall., 525, a patent was issued for land which had been reserved by the President at Fort Leavenworth. Patents within such reser-

vation were issued by the land department. Suit was brought by the United States to recover title, and this court held:

"Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. *If he issues a patent for land reserved from sale by law, such patent is void for want of authority.*"

The contention of the appellee that the "military reservation at Fort Brady" is the reservation for Fort Brady proper, as surveyed by Lieutenant Westcott, cannot be sustained. For reference to the maps shows that the canal did not pass through the reservation for the Fort, which lay a short distance to the east of the reservation for public uses. The canal acts clearly recognize the continued existence of the reservation established according to "Map No. 11."

The Court of Appeals for the Sixth Circuit has recognized the fact set out in the preceding paragraph, for in Scranton *vs.* Wheeler the statement by Judge Lurton says:

"The canal was built entirely *within* the military reservation belonging to the United States."

57 Fed. Rep., 806.

This statement could not have been made, if said reservation had been released, as contended by the appel-

lee, by the President's order of December 9, 1852, or by the action taken under the act of September 26, 1850, providing for the settlement of private claims at Sault Ste. Marie.

The Supreme Court of Michigan has held that the canal strip, four hundred feet wide, granted to the State by the act of 1853, was

"a *part* of the land included in the military reservation, through which the canal was to be built; the act giving the right of way, and granting that width of land for its location and that of the necessary appurtenances."

* * * "It had been for many years a disputed point whether the State could *cross the reserve* without permission, and if it could, there might have been difficulties in the way of condemning land, not being a part of the ordinary domain, but set apart for public purposes, and supposed to be withdrawn from plenary local jurisdiction. This grant removed any doubts upon this subject."

Ryan *vs.* Brown, 18 Mich., 207.

The State of Michigan acquired no title to the 400-foot strip along the line of the canal, but the act provided that "the *use* thereof is hereby vested in said State."

10 U. S. Stats., 35.

Later, on March 3, 1881, the State of Michigan reconveyed to the United States all its right and title in said canal strip, with all its appurtenances, which conveyance was accepted by the act of Congress approved June 14, 1880.

21 U. S. Stats., 189.

190 U. S. 387.

Thereby the use or easement in said four-hundred-foot strip *through* the reservation, which had existed in the State of Michigan, fell back into the larger title existing in the United States to the entire reservation shown on "Map No. II."

Nor can the claim of the appellee be sustained that the portion of said reservation for public uses, sometimes called the "military reservation *at* Fort Brady," to which an easement consisting of an Indian right of occupancy had attached, by virtue of the treaties of 1820 and 1836, was restored to the public domain by the treaty of 1856, by which the Indians surrendered their rights to the United States.

For such easement carried no title to the soil, which had been relinquished by the treaty of 1820.

7 U. S. Stats., 206.

Paragraph VI of complainant's bill, (record, 5, 6.)

Such easement, while it existed, was an incumbrance upon the "reservation for public uses" which is the same as "the military reservation *at* Fort Brady" and, although defined by definite lines upon the public survey, did not remove the fee in the soil from the United States. The existence of such easement or reservation, within the larger boundaries of the reservation for public uses, was entirely consistent with the co-existence of such reservation for public uses and with the continuance of said later reservation after the extinguishment of the Indian rights. In Spalding *vs.* Chandler, Mr. Justice White, who delivered the opinion of this court, carefully abstained from any expression

contrary to this principle. For, speaking of the reservation of this land by the President on April 3, 1847, the opinion says:

"The general grant of authority conferred upon the President by the act of March 1, 1847 (9 Stat. at L. 147), to set apart such portion of lands within the land district then created as were necessary for public uses, cannot be considered as empowering him to interfere with reservations existing by force of a treaty. The land was appropriated in a sense which exempted it from a reservation made in such general terms,—*at least so long as the Indian right of user remained unextinguished.*"

"If the reservation for public uses *and* for the purposes of Fort Brady, made by the President's orders, was valid, the operation of those orders, so far as the Indian reserve was concerned, was clearly *postponed* until after the extinguishment of the reserve either by a voluntary cession to the government, a cessation or abandonment of the use, or the arbitrary exercise by Congress of its power to appropriate the same."

Spalding *vs.* Chandler, 160 U. S., 405, 406.

But the reservation which the United States is here seeking to uphold is not a reservation "made in such general terms." On the contrary it is the permanent reservation specifically made in 1852, *under the Act of September 26, 1850*, (9 U. S. Stats. 469) and specifically designated on "Map No. II," which was set aside for public uses out of the lands temporarily reserved for investigation by the reservation to which Mr. Justice White refers.

As set out in paragraph VI of the complainant's bill, the only interest of the United States in securing the

relinquishment by the Chippewa Indians of their right of encampment upon the shore land claimed by the appellee herein (by virtue of which it claims riparian title to Islands 1 and 2) was that the United States might, without embarrassment, hold and devote said land to public uses in connection with the improvement of navigation at that point. That this is true conclusively appears from the large sum paid by the United States to the Indians for such relinquishment. The consideration paid by the United States was **$17,475.**

Appropriation Act, 11 U. S. Stats., 172.

The total area covered by the encampment rights of the Indians was, according to the official plat, thirty-six and one-half acres. The area of the land embraced in the void Chandler patent, as stated in said patent, is 9.10¾ acres, which is one-fourth of the total area of the encampment rights.

The ordinary price of public lands at the time of the extinguishment of the Indians' title was $1.25 per acre. At that price, the price of the land embraced in the Chandler title would be **$11.38.** Instead of paying cash Chandler surrendered scrip, which was accepted in lieu of cash, and in return therefor received a paper title (which we contend is VOID) to land which actually cost the United States **$4,369.**

We submit that **it is inconceivable that the United States procured the relinquishment of the Indians' rights for the purpose of any such disposal of the lands affected thereby.** On the contrary, the whole transaction clearly evidences the intention of the United

States to retain such lands in a state of reservation for the uses herein described.

Major Weitzel's letter to the Chief of Engineers dated November 3, 1881, states that Chandler was, at the time he located this land, the collector of tolls on the canal while under the management of the State of Michigan and that he was then a superintendent on the management, under the United States, and that Chandler said that he located the land for a speculation.

Record, 184.

Such speculations are not regarded with favor. In a similar case, involving the reservation of saline lands, this court said that such speculators are "a class of persons whose interests Congress has never been swift to promote."

Morton *vs.* Nebraska, 21 Wall., 660.

**B.**

**Effect of Order of December 9, 1852, Releasing Portion of Lands Previously Reserved.**

In the court below misapprehension arose as to the successive reservations which have been made by the United States for public uses at the place here in controversy. Such misapprehension is shown in the opinion of that court and is pointed out in the appellant's assignment of errors, Nos. 21 to 33, inclusive.

The failure of the court below to apprehend the historical sequence and legal effect of so many reservations and easements, contained in so large a record is perhaps not surprising, although counsel for the

United States endeavored, by ample brief and oral argument, to simplify the matter as much as possible. We are convinced that if the court had fully understood the matter, it would have decided in favor of the government. We also believe that the record before that court was ample to lead to a correct conclusion and contained all the matter from the public archives necessary to a correct decision of the case. But in order to make the subject still more clear we have printed, as Appendix D of this brief, certain correspondence between three Departments of the government (some of which is not found in the record) relating to the release, not of the specific reservation which the government claims now to be in existence, but to the release of a portion of the temporary reservation of April 3, 1847, from which release the reservation claimed now to exist was excluded. We produce, and offer for the consideration of the court, certified copies of such correspondence, under the rule established in Jones *vs.* United States (137 U. S. 215) and Knight *vs.* United Land Association (142 U. S. 169).

Inasmuch as the appellee claims title to Islands 1 and 2 not by virtue of any specific grant, but merely by virtue of alleged ownership of the adjacent shore, the question of the validity of said shore title becomes pertinent and essential. We apprehend that the fact that the adjacent shore was at one time reserved by competent authority of the United States from disposal as a part of the public lands has been already sufficiently established. But the question remains whether said reservation was terminated and released by the President's order of December 9, 1852.

In order to understand perfectly the effect of the various reservations, which included the shore title asserted by the appellee, and the various actions reducing said reservations within narrower and successively narrower limits, it is desirable to collect such actions under the particular heads to which they relate. It is essential to a knowledge of the situation at Sault Ste. Marie, and of the contemporaneous construction regarding such situation, that release orders relating to one reservation should not be mistakenly applied to other orders of reservation.

We beg therefore to call attention to the following historical résumé of the successive reservations, which were five in number, as follows:

(1) The reservation established by General Brady in 1822, under the direction of General Scott.

(2) The temporary reservation of the fee simple by the President on April 3, 1847.

Addition to record, Map 2.

(3) The specific reservation of the fee simple by the President on September 2, 1847.

Addition to record, Map 3.

(4) The specific and final reservation of the fee simple by designation of the Secretary of War, under the act for the settlement of titles at Sault Ste. Marie, approved September 26, 1850.

Addition to record, Map 6.

(5) The Indian Reserve of an easement, under the treaties of June 16, 1820, March 28, 1836, and July 31, 1855, set out in paragraph VI of complainant's bill.

### (1.) The Reservation of 1822.

This reservation was made by Gen. Brady under the orders of Gen. Scott, found in the record at pages 92, 93 and 95, and extended along the water for two miles westward and two miles eastward from the fort, running four miles southward into the interior. Whether such reservation was by higher authority than that of Gen. Scott does not appear, but evidence of this reservation, or attempted reservation, is introduced to show the consistent policy of the officers of the United States to reserve the south shore of the Straits of St. Mary at the point in question for great public uses. Whether or not such reservation was effective in law (although it certainly was so in fact; record, 93, 95, 744 to 757) is not essential to appellant's case, as the definite and unmistakably authorized reservations which followed, including the shore land in question, were established prior to the inception of appellee's title.

### (2.) The General Temporary Reservation of April 3, 1847.

This reservation was by the President, under authority of the act of Congress of March 1, 1847.

9 United States Stats., 146.

It embraced not only the entire north half of township 47 north, range 1 east (including section 6), but many tracts extending from Detour on the east, along the waters of the Great Lakes westward, to the Montreal River, on Lake Superior. Such tracts are shown

on Map 2 of addition to the record which forms a part of complainant's exhibit No. 11. This reservation was professedly temporary in character and to continue only "until the requisite investigation can be had."

See letter of Commissioner to Secretary of the Treasury, Secretary to the President and President's order reserving the lands "as recommended by him."

Record, 137, 138.

Addition to record, Map 2.

The reservation so established contained many tracts which were, upon the completion of the "requisite investigation," found unnecessary to be reserved for public purposes and it is this temporary and tentative reservation of April 3, 1847, which was referred to in the President's order of December 9, 1852, in which the President reserved such lands as were, after such investigation, found to be needed for public purposes and released "all the remaining lands situated in the tracts which were temporarily reserved for 'public uses' in the year 1847 (except the military reservation *at* Fort Brady)."

Record, 163.

It is of the highest importance that the release on December 9, 1852, of the lands temporarily reserved in April, 1847, should not be confounded with the official action which was taken upon the definite and specific reservation made by the President on September 2, 1847, which was not temporary and which was not released or reduced, except by the operations under the act of September 26, 1850, and the designations by the Secretary of War under authority of that act.

That this is true is clearly shown by the correspondence leading up to the release by the President on December 9, 1852, of the temporary April reservation, on the one hand, and the correspondence leading up to the final designation by the Secretary of War of the reduced boundaries of the September reservation, on the other hand. If this distinction is kept in mind it will be perfectly evident that when, in the President's order of December 9, 1852, he releases certain portions of the lands "*temporarily* reserved for 'public uses' in the year 1847," without designating the month, he referred to the April, and not to the September, reservation.

Official action was being taken in 1852, looking to the reduction of both the temporary and the specific reservations, and unless care be taken the correspondence relating to the one subject may well be confused with that relating to the other.

The temporary reservation of April 3, 1847, of lands at Sault Ste. Marie, and many other tracts of land, continued until, on April 30, 1852, the Commissioner of the General Land Office wrote to the Secretary of the Interior, calling attention to the temporary reservation "in the year 1847," and stating that memorials had been received, signed by Messrs. Cass, Felch, *Stuart* and others, requesting that the lands not needed be restored to disposal. Said letter speaks of large bodies (not a single body) of lands and also speaks of said lands as having been reserved for lighthouse, military, naval, Indian and other public purposes, which language is certainly not intended to describe the single reservation of five fractional sections at Sault Ste.

Marie existing by virtue of the specific reservation order of September 2, 1847. The letter further submits "diagrams exhibiting the bodies of land so reserved."

Record, 740.

Although the memorials referred to are not found in the record, it is evident that they are not that by Messrs. Conger, Penniman, Cass, Felch and Smith, found at pages 148 and 149 of the Record, because, first, the name of Stuart is not subscribed thereto and, second, said last mentioned communication refers only to the specific reservation at Sault Ste. Marie and not to the general reservation for many other purposes, and third, because said latter communication was made the subject of a separate letter by the Commissioner to the Secretary on April 29, 1852, found on page 150 of the record.

Nor are said memorials the subject of the letter of the Secretary of the Interior to the Secretary of War on May 7, 1852, because that letter relates exclusively to lands at Sault Ste. Marie.

Record, 151.

It is evident, therefore, that the Secretary of the Interior sent another letter on May 7 to the Secretary of War, which is not in the record but which is printed at page xxvii of the Appendix to this brief, and which related to the general temporary reservation and to which the Secretary of War replied on May 25, 1852, returning maps and diagrams showing the reservations of public lands "in the vicinity of Lake Superior heretofore made for military and other purposes" and stat-

ing that none of such reservations was required to be permanently reserved "except that *at* Fort Brady."

Record, 152.

See also history of the reduction of the temporary reserve in Commissioner's letter to the Secretary of the Interior, dated May 4, 1857.

Record, pages 795-797.

As shown by the last above-cited letter, the Navy Department on June 24, 1852, advised the Secretary of the Interior that no naval reservations were needed within the region covered by the temporary reservation of 1847.

Appendix to this brief xxx.

Thereupon, after not unusual official delay (due possibly to the concurrent efforts of the Interior Department and War Department which were proceeding at that very time to ascertain the final limits of the reserve AT Fort Brady), the Commissioner of the General Land Office wrote to the Secretary of the Interior on December 2, 1852, submitting a list of lands to be permanently reserved *"out of all the lands on and near Lake Superior"* which had been reserved for public uses in 1847 and recommending the release of all the residue except that "for" or "at" Fort Brady.

Record, 161.

The language of said letter conclusively shows that it refers to the temporary reservation of April and not the specific reservation of September, 1847, which



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latter tract was evidently the one intended by the Commissioner to be excluded from the release.

On June 11, 1852, the Secretary of the Treasury designated the lands he desired to be permanently reserved.

Appendix to this brief, xxxi.

Thereupon followed the President's order of December 9, 1852, permanently reserving certain tracts and releasing the remaining lands which had been "*temporarily*" reserved in 1847.

Record, 163.

It is only necessary to look at list B (record, 161 to 163), upon which the President's order of release was endorsed, to be convinced that the order related to the April and not to the September reservation and that the President in making an exception to such order of release had in mind the then existing reserve at Sault Ste. Marie, either to its full extent, or to the extent of five fractional sections to which it had been reduced by the specific reservation of September 2, 1847, or to the extent to which it had been reduced by the Secretary of War on August 5, preceding.

**(3.) The Specific Reservation of September 2, 1847.**

This was the specific (not temporary) reservation established by the President for the military post and other great public purposes at Sault Ste. Marie. It added to sections 4, 5, and 6 of T. 47 N., R. 1 E., the additional sections 1 and 2 of T. 47 N., R. 1 W. Said

sections 4, 5, and 6 had previously been included in the larger temporary reservation of April 3 of the same year, which included the entire N. ½ of T. 47 N., R. 1 E.

Complainant' Exhibit B, (record, 806-808).
Addition to record, Map 3.

It was based upon a definite request by the Secretary of War, dated August 25, 1847, which in turn was based upon a report and recommendation by Col. Abert, Chief of the Corps of Topographical Engineers, dated August 14, 1847.

Record, 807.

Said reservation remained intact until reduced by successive designations by the Secretary of War under the duties imposed upon him by section 2 of the Act of September 26, 1850.

9 U. S. Stats., 469, 470.

Even without such specific authority said designations by the Secretary of War would have been valid and conclusive.

Wilcox *vs.* Jackson, 13 Peters, 513.

**(4.) The Specific and Final Reservation Under the Act of 1850.**

The operations under said act of 1850, leading up to his final designation of the specific reservation at Sault Ste. Marie, shown on "Map No. II" in blue color, are evidenced by an entirely different set of correspondence from that leading up to the partial

release of the temporary reservation of April 3, 1847, which has been noted above. Said operations began and continued as follows:

On August 14, 1851, the Commissioner of the General Land Office, sent to the Secretary of War a "map on a large scale of the lands of the public surveys at Sault Ste. Marie," as required by section 2 of the act, and requested him to cause to be made the designation required by the act, which included not only land necessary for military purposes but that required for other public purposes.

Record, 146.

On September 12, 1851, Colonel Abert, Chief of the Corps of Topographical Engineers, recommended the reservation for public purposes of all the lands between the line C A H and the river.

Record, 147, 148.

On January 27, 1852, the Quartermaster General reported to the Secretary of War that the limits already marked on the map were sufficient for military purposes.

Record, 147.

On March 10, 1852, the Secretary of War returned said map, known as "Map No. I" to the Commissioner, thus performing his duty under section 2 of the act, as the designations appeared thereon.

Record, 146.

Addition to record, Map 5.

Attention is particularly called to the fact that on said map the land for military purposes and the land for other purposes formed a continuous body, extending along the south shore of the straits, and inasmuch as such designation was made by the Secretary of War, it is quite natural that any portion of such land might, at any subsequent time, be referred to as the "military reservation."

On April 2, 1852, a remonstrance was made by Messrs. Conger, Penniman, Cass, Felch and Smith, said remonstrance being directed expressly against the large limits outside of the Post of Fort Brady and devoted to other public uses.

Record, 148, 149.

Thereupon, on April 29, 1852, the Commissioner of the General Land Office wrote to the Secretary of the Interior, recommending a revision of the designation adopted by the Secretary of War, in order to accommodate the citizens of the community.

Record, 150, 151.

It will be observed that the above letter was directed to the specific reservation (by Map No. I) under the act of 1850 within the limits of the September, 1847, reservation, while the letter of the following day (record, 740) was directed to the larger temporary reserve of April, 1847.

On May 7, 1852, the Secretary of the Interior submitted the matter of the reduction of the specific reserve at Sault Ste. Marie to the Secretary of War.

Record, 151.

On May 11, 1852, Col. Abert recommended "the reservation *for canal and other purposes* should be *north* of the line E F G"

Record, 153.

On May 12, 1852, the Secretary of War required Col. Abert to report and recommend "the precise width of the narrowest part of the *space reserved for the canal.*"

Record, 154.

On June 17, 1852, Col. Abert renewed his former recommendation as to the limits of the Fort and extended the limits of the reserve for other public purposes so as to include the space A E F G. These tracts are those marked blue on "Map No. II," and Col. Abert says that "The Fort Brady AND military reservation is all included in the part of the map so marked and tinted blue."

Record, 154, 155.

Addition to record, Map 6.

This language would certainly indicate that Col. Abert regarded the blue strip of land along the so-called "Indian Reserve" and proposed canal as constituting the "Military Reservation."

On June 21, 1852, the above adjustment having evidently met the approval of the Secretary of War, Col. Abert seems to have been directed by the Secretary to make the formal designation required by section 2 of the Act of 1850, which he proceeded to do on that date.

Record, 155.

In the meanwhile, on May 18, 1852, General Totten, Chief of Engineers, had reported upon the strictly military aspects of the case regarding the reservation of land for the Fort proper, as had Major Gore, commanding the post, on May 31, 1852.

Record, 811, 812, 813, 814.

Later, on July 14, 1852, Inspector-General Churchill reported further on the strictly military features of the reservation and on July 30, 1852, General Totten reported further on the same military features.

Record, 813.

On August 5, 1852, the way having been cleared for a final designation of the tracts to be designated by the Secretary of War for permanent reservation, the Secretary of War advised the Commissioner of the General Land Office as to the limits of the reserve for the Fort, referring to Map No. II, and said further:

"*As regards the reserves for other purposes than military, I refer you to the report of the Chief of the Topographical Bureau and to the map.*"

Record, 809.

Addition to record, Map 6.

In the above the Secretary of War clearly adopted the final view of Col. Abert and established the reservations under section 2 of the act of 1850 as including those portions tinted blue on Map No. II. The suggestion made by appellee's counsel at the hearing below that the designation of the westerly blue tract, which he makes by mere reference to Col. Abert's re-

port, was not his own designation, seems too absurd to warrant discussion. His reference to such report *and to the map* is an evident adoption and approval of the map and report in their entirety.

The utmost diligence of counsel on both sides has failed to discover any further change in the designation so made under the act of 1850, as to the westerly tract. When made, it had the force of law under the act, as an absolute reservation of the lands, so shown in blue on Map No. II. And so the reservation stands to this day, notwithstanding any errors later committed by officers of the Land Department in issuing patents to land embraced therein.

Attention is called to the endorsement on said letter of August 5, 1852, found at the bottom of page 809 of the record, said endorsement showing that said letter of August 5, 1852, was in reply to the letter of the Commissioner to the Secretary of the Interior dated April 29, 1852, (record, 150). Said correspondence has to deal only with the *specific* reservation at Sault Ste. Marie and it is therefore evident that the correspondence beginning with the letter of April 30, 1852, by the Commissioner to the Secretary of the Interior (record, 740) dealt not with said specific reservation but with the general temporary reservation of April, 1847. It taxes the imagination to suppose that, at the very time that the Secretary of War was making the efforts above set forth to make a *final designation* of the reserves at Sault Ste. Marie, he should have been engaged in a concurrent correspondence leading to the release of the same reservation or reservations by the President's order of December 9, 1852.

### (5.) The Indian Reserve of an Easement.

It will be noted that in the successive reservations above mentioned the fee in the soil had been absolutely withheld from disposal. The United States having acquired the land from Virginia, and not having granted out the fee to any individual or State, the whole title remained in the United States, such title being, however, up to the Treaty of 1820 with the Chippewa Indians (7 U. S. Stats., 206) encumbered by a qualified title in said Indians. After said treaty full title to the soil remained in the United States, subject only to the right of fishing and the place of encampment at the Falls of St. Mary's, provided for by Article 3 of said treaty.

Such right of encampment was a mere floating easement which might have been located at any spot convenient for the Indians and not inconvenient for the United States. Such place was designated, as was proper, by the military officers of the United States who had maintained a *de facto,* if not *de jure,* reservation ever since 1822. General Brady reports:

"The strip of land between the old carrying road from the foot to the head of the rapids, and the rapids, has ever been allotted to the Indians to encamp on, and as the line of the contemplated canal runs but little to the south of the old road, I have directed Captain Johnston to consider all north of the canal as the Indians' encamping ground."

**Record, 94.**

This report and designation, dated June 19, 1844, was evidently the authority for the adoption, by Sur-

veyor Mullett, of the designation so made, when he made the public land surveys of the township in the following year, 1845.

But it is entirely evident that neither General Brady nor the other military authorities who had concurred, and continued to concur, in maintaining, free from intrusion by individual claim of right, the entire south shore of the strait at that point, from the head to the foot of the rapids, regarded said "encamping ground," or so-called "reserve," as anything but a designation of the place where the easement created by the treaty should be enjoyed. For on August 18, 1846, Lieutenant Westcott reported that in accordance with General Brady's instructions he had, by military force, removed a fence near the head of the portage.

Record, 744-747.

By the report of Lieutenant McConnell, commanding Fort Brady, dated May 7, 1850, it appears that the permission of the Secretary of War was necessary before citizens could build a portage railroad across the tract known as the "*Military Reserve.*"

Record, 752.

The course of said railroad is shown on Map No. II (addition to record, Map 6) within the westerly tract colored blue and lying partly within and partly to the south of the so-called "Indian Reserve."

On July 11, 1850, General Brady wrote to the commanding officer at Fort Brady regarding said railroad which he describes as going "across a portion of the *Military Reserve* at the Sault Ste. Marie."

Record, 752, 753.

On July 25, 1850, a temporary and revocable license was granted to construct said road "over a part of the *Military Reserve* at Sault Ste. Marie."

Record, 754.

On August 8, 1850, Lieutenant Russell advised the promoter that his railroad "across the Portage on this *Military Reserve* may be fifty feet in width."

Record, 756, 757.

In presenting his claim under the Settlement Act of September 26, 1850, as agent and attorney for the railroad company, John T. Whiting speaks of warehouses at the head and foot of the portage "on lands belonging to the United States known as the '*Military Reserve,*' " and of the railroad "across a portion of said reserve" and he also speaks of Fort Brady as "a military post *on* said reservation."

Record, 749.

Said formal claim was dated March 22, 1853, which was after the release order of December 9, 1852, and therefore shows the general understanding of the community that the release order did not confine the reserve to the limits of the post.

Record, 751.

The jurat attached to the said claim is dated "March 22, *1850,*" which is evidently a mistake, as the paper which is sworn to recites the Act of September 26, 1850, and as another paper filed by Whiting refers to his claim having been presented during the winter of 1852-3.

Record, 747.

It is evident therefore that neither the officers of the War Department, who were charged with the duty of maintaining the reservation at that point, nor the people living in the vicinity and intimately interested in the status of said reservation, regarded the Indian Reserve as a separate thing from the "Military Reservation" which existed by force of statute and executive action in accordance with statute. On the other hand it is evident that they regarded the "Indian Reserve" as a mere easement, existing on and within the larger boundaries of the Military Reservation which had been so established. It remained for Mr. Chandler to assert, nearly thirty years later, that the contrary was true and that lands which the War Department officials supposed were permanently in their possession and control were susceptible of disposal as vacant public lands. Meanwhile, during those thirty years, commerce on the Great Lakes and through the canal was increasing by leaps and bounds, the town was rapidly growing, all lands known to be vacant were being taken up by individual claimants, but the Indian Reserve remained unclaimed except for a single unsuccessful attempt by one Adsit, as follows:

In 1856 or 1857 Adsit moved on the Indian Reserve, built a house and raised some garden vegetables. Later he "proved up" his claim thereto before the Register and Receiver of the Land Office at Marquette, and on December 5, 1859, received a certificate of entry.

Spalding *vs.* Chandler, 84 Michigan, 141.

But on February 8, 1869, the Commissioner of the General Land Office referred the Marquette officers to his instructions of June 9, 1853 (found at page 741 in the present record) by which they were informed that the land with other lands was within the "*Military Reservation*" for Fort Brady. In response to said action the local officers replied, claiming that the Military Reserve had been reduced to about forty acres and did not include the lands in question, also referring the Commissioner to the Act of Congress of September 26, 1850, but without avail, for the Commissioner, on April 9, 1860, cancelled Adsit's entry.

Spalding *vs.* Chandler, 84 Michigan, 142.

The above executive action was early enough fairly to be called contemporaneous executive construction as to whether or not the Indian Reserve, a portion of which was, more than twenty years later, located by Chandler, was released from reservation, either by the President's order of December 9, 1852, or by the operations under the act of 1850, or otherwise, and such construction was clearly in the negative.

The Supreme Court of Michigan held:

"It would, no doubt, under such circumstances, not be in the interest of the government, or of the whole people, to permit the pre-emption of these lands; *nor yet the location of them by scrip, as was done by Chandler in this case.* But, as before said, *there need be no inquiry into Chandler's title here, if complainant's is not good.*"

Spalding *vs.* Chandler, 84 Michigan, 147, 148.

## C.

### Further Contemporaneous Construction.

Where, in the preceding subdivisions, we have restated matter previously stated, we beg that such restatement may not be considered as useless repetition. It is intended thereby so to collate the various official actions into coherent groups as to make clear the relations of said various actions to each other and to show what must have been the contemporaneous understanding of the officers of the Government as to what was the "Military Reservation" and what were its limits before, at, and subsequent to, the President's release order of December 9, 1852.

It appears from the foregoing résumé that some divergence of opinion existed in the minds of various public officers as to the limits of the tracts reserved subsequent to said order. The officials of the War Department relied upon their records showing the reservations in blue on Map No. II, and continued so to rely upon their possession and control of said lands until startled by the location of Chandler twenty-nine years thereafter. Certainly no contemporaneous force can be given to such location which was made so many years after the event, or to the patent issued two years later.

On the other hand, the Commissioner of the General Land Office continued to regard the reservation *at* Fort Brady, included in the exception of the President in his order of December 9, 1852, as covering the whole of sections 4, 5 and 6 of township 47 north, range 1

east, and sections 1 and 2 of township 47 north, range 1 west (such reservation having been established by the definite and specific reservation by the President on September 2, 1847) except so far as the lands so reserved had been disposed of under the act of 1850 for the settlement of titles at Sault Ste. Marie. Such understanding was expressed by the Commissioner's letter to the Register and Receiver dated June 9, 1853 (record, 741), interpreting his letter of February 26, 1853 (record, 311, 312). Such understanding was also shown by his action in the Adsit case (*supra*). Such understanding was also shown as late as July 17, 1894, when he so held in the Torrent case (record, 765 to 780), regarding a small fractional quarter of section 2 in township 47 north, range 1 *west,* at the westward extremity of the reservation of September 2, 1847.

It is true that the Commissioner later reviewed said decision, but in so doing he held that said tract in the township west of the lands now in question had been released "by the action of the War Department on March 10, 1852, in fixing the boundaries of the Fort Brady Military Reservation *in said sections 5 and 6* of township 47 north, range 1 east," and that said action "had the effect of restoring the balance of the land described in the executive orders of April 3 and September 2, 1847, to the public domain."

Record, 325.

Even according to said later decision the reservation was maintained north of the line C A H, in section 6, according to Map No. I, (addition to the record, Map 5), except so far as it had been disposed of by

granting of titles under the act of 1850. This opinion sustains rather than weakens the validity and continuance of the final designation of August 5, 1852, which was a smaller tract than the limits recognized by the Commissioner in said decision on review.

The defendant offered in evidence a so-called "History of Fort Brady" found in the records of the Adjutant-General of the Army and compiled in that office. Said "history" is not a book, as might be supposed, but is a paper memorandum, unidentified, uncertified, undated, unsigned, and lacking all authenticity.

See objection to its introduction, record, 306.

The document was merely found in the War Department as a compilation by some unknown person, bearing internal evidence that it was prepared after March 3, 1875, and was not therefore contemporaneous with the designation of August 5, 1852, twenty-three years previous. When it says that the tracts temporarily reserved in 1847, "except the military reservation at Fort Brady with an area of about thirty acres were restored to the public domain," it speaks without any authority whatever. Furthermore, said document was compiled and found in the records of the Adjutant-General, who is concerned merely with military matters, *i. e.,* the *Fort,* and not in the office of the Chief of Engineers, to whom is entrusted the duty of maintaining and operating the canal and locks and exercising supervision over grounds appurtenant thereto.

We admit, however, that the action of the Land Department has not been entirely uniform in maintaining the reservation either within the limits established by

the President's order of September 2, 1847, or within the limits designated by the Secretary of War on August 5, 1852. In a few, a very few, instances patents have been granted within the latter limit but such few patents seem to have been granted (with the exception of the Chandler patent, which we claim is void) under the mistaken impression that such action related to the settlement of land titles at Sault Ste. Marie under the act of 1850.

The defendant put in evidence large lists of confirmations under said act. On pages 315-317 of the record appears a list of eight-four confirmed claims. On pages 317 to 320 appears a list of thirty-five confirmed claims, and on page 321 appears another confirmed claim. The court, finding these confirmations in the record, might well be appalled by the fear that, if the contention of the United States herein be allowed, a general unsettling of titles at Sault Ste. Marie will result. But the fact is that, out of the one hundred and twenty confirmations so shown, only small fractions of *three* claims of them lie on *land* north of the line E F G. Portions of three more lie within the reserve at the extreme east, at the point A on Map No. II, and NONE OF THEM lie within the limits of the old Indian Reserve. It will thus be evident to the court that the entire city of Sault Ste. Marie is not involved, as might be supposed from defendant's record, and that the Government is not engaged in a wholesale crusade against existing and established titles.

For the fact is that no titles (except the Chandler title) have ever been granted within the limits of the

Indian Reserve shown by the Mullett township survey of 1845, the plat of which appears in Addition to the record, as Map 1. That part of the Military Reservation was sacredly preserved by the Land Department until the mistaken and unwarranted action of issuing the Chandler patent in 1883, which was not contemporaneous construction because it was thirty-one years after the designation of 1852.

For convenience in demonstrating the truth of the above statements we have had prepared and have included herein a comparative map, compiled from two maps already in the record. This map is offered by way of illustration of what the record already shows and not as an introduction of new evidence. The two maps referred to are Map No. II, accompanying the final designation of August 5, 1852 (complainant's exhibit 18 being also Exhibit C of complainant's bill, Addition to record, Map 6), and the Whelpley map (complainant's exhibit 23, being also exhibit E of complainant's bill).

In the comparative plat the Whelpley map has been used as a basis and upon it has been laid down, by a red dot and dash line, the limits of the reservation A E F G as shown on Map No. II. The railroad shown on Map No. II, to which reference has herein been made, also appears. This map shows how far (*and how little*) invasions have been made upon the reservation established according to Map No. II by the granting of private titles therein.

At the extreme west and north of the canal strip, where it curves into the waters of the strait at the west, appear claims 95 and 96, which were confirmed

in list No. 1 (record, 316). It will be observed that said claims are wharfage rights and that they lie entirely to the westward of the shore line and so entirely in the water, as will further appear from the description of the survey thereof on page 456 of the record. They were disposed of under the act of 1850, the Register and Receiver having the erroneous idea that the United States could grant titles to the bed of the waters, while title to such bed is indisputably in the State of Michigan. Inasmuch as they are in the water they do not invade the reservation, which was of land.

North of the canal strip, but south of the old raceway which bounded the Indian Reserve, appear very small parts of the larger private claims 3, 4, and 5 containing respectively .53, .48 and .025 acres. These small fragments were granted to private claimants, under the act of 1850, together with the larger portion of the claims to which they belonged which lie south of the canal strip. The area so erroneously granted totals 1.035 acres. Said tracts, moreover, were not confirmed until May 22, 1857, and patents were not issued thereon until *1874* and *1882* (record, 317, 671, 673, 675). The issue of such patents certainly cannot be regarded as contemporaneous construction.

On pages 313 and 314 of the record defendant exhibits a patent showing the sale to Thomas R. Easterday, as trustee of Chippewa County, of lots 2, 3, 6 and 7. Lots 6 and 7 are two blocks south of the reservation and appear just over the word Spruce at the bottom of the comparative map. Lot 2 is the irregularly shaped lot also lying on Spruce Street just east of claim 18, which, in turn, is east of the public square and is

outside of the limits of the Reserve. Lot 3 lies at the northwestern corner of the map, is designated as "United States vacant lot 3, containing 1.51 acres" and is north of the line A E F G, but outside of the tract known as Indian Reserve. It was included in the patent under the mistaken idea of the land officers that they were thereby adjusting titles under the act of 1850, which is recited in said patent, which was a clear mistake on their part. But said patent was not issued until *1879*, twenty-seven years late, and cannot be regarded as a contemporaneous construction.

At the eastern end of the Reservation, north of Water Street and east of the old tail-race, the Reservation A E F G is intruded upon by three private claims, Nos. 76, 77 and 78, a portion of which claims lay in the water. Said lots are shown by the record, 316 and 319, to have been confirmed in 1857 and 1858. Whether they were patented does not appear from the record, but if patents did issue, which we do not admit in the absence of proof, it was only by further error in adjusting titles under the act of 1850 and invaded but a small portion of the Reservation at its extreme easterly end. And if so patented, such action was again carefully restricted to lands outside of the old Indian Reserve which, with the canal easement running through it, constituted practically the whole of the Reservation as designated on August 5, 1852. *The report of the Register and Receiver under the act of 1850 shows that they confirmed no lands within the Indian Reserve* (record, 666).

The utmost conclusion that can be drawn, therefore, unfavorable to the continued existence of the Reserva-

tion designated on August 5, 1852, is that the land officers sometimes regarded the reservation for public uses as confined to the canal strip and lands included in the old Indian Reserve and in their adjustments (which, however, were not all contemporaneous) permitted small fractions of the reservation of August 5, 1852, to be disposed of. But never until 1883, thirty-one years later, except possibly in case of said claims 76, 77 and 78, was any patent issued for land within the Reservation for public uses, if its limits were correctly so understood.

No conclusion adverse to our position can be drawn from the efforts of the United States Engineer Officers, immediately following Chandler's assault upon the reservation, or from the efforts of the land officers and the President, to reserve over again all portions of the Military Reservation in order that further catastrophe might not fall. On the contrary, such action is the best evidence that the prior and contemporaneous construction of those officers of the Government had been that the prior reservation was sufficient. For if they had not thought so, why the sudden haste when their possession was threatened by Chandler's claims? The long abstention, for thirty years, from such reservations, followed by instant activity upon Chandler's appearance, shows more clearly than written documents what the contemporaneous construction had been.

The defendant also exhibits in evidence two patents to Pendill (record, 328-330) for parts 1 and 2 of the Indian *Agency* Reserve, which lay in section 5, far to the eastward of the land under consideration. In re-

buttal the complainant offered correspondence and other papers regarding such disposal, showing that the Indian *Agency* Reserve, being no longer needed for Indian purposes, was disposed of at public outcry in accordance with law.

Record, 737, 738, 739, 741 and 742.

See also the official plat approved November 14, 1873, according to which said land was sold (offered by complainant as exhibit No. 61, record, 737). Said tract was not disposed of according to the Mullett survey or the Whelpley survey, but according to a new plat specially prepared by the Commissioner of the General Land Office as *ex officio* Surveyor General under the provision of the act of Congress approved January 22, 1853 (10 U. S. Stats., 152).

Addition to transcript of record, Map 10.

This shows that neither Mullett's nor Whelpley's surveys extended into reservations.

The defendant also exhibited a patent to the Methodist Missionary Reserve (record, 674 to 677) for land in sections 9, 16 and 21. Said patent was issued under special act of Congress approved June 22, 1860 (12 U. S. Stats., 88), and the right of Congress to make said grant is undoubted. The patent shows on its face that it was issued according to the original Mullett survey and it was not issued until 1879, too late to establish a contemporaneous construction, even if such construction were unfavorable.

And finally, to show that the Reservation north of the line E F G has been substantially maintained and

preserved by the officers of the United States, which is certainly a high form of contemporary construction, we refer to the testimony of Joseph Ripley, General Superintendent of the St. Marys Falls Canal and in local charge of the improvements of St. Marys River. Mr. Ripley says that the southern boundary of the ground at present occupied and used by the United States Government for the purpose of the canal and locks *is substantially the same as the line E F G.*

Record, 237.

We submit, on the above review, that the President's order of December 9, 1852, did not release the lands now embraced in the appellee's alleged shore title from reservation and that the contemporaneous construction was to maintain the Reservation in its integrity as established by the Secretary of War on August 5, 1852, in pursuance of his duty under the act of September 26, 1850. So far as the Reservation has not been maintained to its full extent, the invasions thereof have been mistakes and not warranted by law and have been insignificant and subject to the rule *de minimis lex non curat.* The encroachments upon the full extent of the Reservation A E F G have been few in number and do not constitute any such body of rulings as to call for the application here of the principle of contemporary construction against the Reservation of record. Furthermore, such encroachments upon the Reservation have been so far subsequent to its establishment that they cannot be regarded as establishing a contemporaneous construction adverse to our contention.

## IV.

## LAND IN CHANDLER PATENT NEVER SURVEYED.

The appellee's title rests upon a location by Porterfield scrip. The act authorizing such locations requires the land taken thereby to be land which has been officially surveyed by the United States according to the usual legal subdivisions of such surveys. The appellant claims that the land embraced in the appellee's title had not been, at the date of the application in 1881, or at the date of the patent in 1883, and has not been up to the present time, surveyed under authority of the United States.

At the time of the official township survey by Mullett, in 1845, a larger tract of land, including that claimed by appellee, was not only included in the military reservation made by the military officers in 1822, as shown in the preceding subdivision, but a smaller portion of said large tract—said small portion also including the land embraced in the Chandler patent—had also been set apart for the use of the Indians under the treaties of 1820 and 1836, as alleged in Paragraph VI of complainant's bill.

On September 20, 1844, the Commissioner of the General Land Office sent instructions to the Surveyor-General regarding the survey of the public lands in the northern peninsula of Michigan, in which he specifically forbade the survey of the tract so occupied by the Indians.

Record, 125, 126.

In pursuance of said instructions by the Commissioner, the Surveyor-General, on April 2, 1845, entered into a contract with Mullett for the survey of this township, which contract specifically *excluded* "such islands and other lands as are or may be reserved for the Indians, or for other purposes."

Record, 128.

On the same date the Commissioner issued special instructions to Mullett, under said contract, in which, referring to said Indian reservation, he said: *"This reserve you will exclude from the survey and return a survey of its boundaries to this office."*

Record, 130, 131.

Similar instructions were issued regarding the survey of the township to the west of this township, which also contained a portion of the reservation of September 2, 1847, for public purposes at Sault Ste. Marie.

Record, 134.

The field notes of Mullett's survey of township 47 north, range 1 east, within section 6 of which Islands 1 and 2 are situated, are in evidence (complainant's Exhibit 9; record, 96-122), and show that the instructions were followed and that the public land surveys were closed on the Indian reserve in section 6 and on the other reservations in said township. This also appears by the official plat of survey of said township found in complainant's Exhibit A.

Addition to record, Map 1.

Such closing on the Indian reserve was in accordance with the act of Congress of May 18, 1796, providing for the sale of lands in the territory northwest of the river Ohio and establishing a system of surveys therefor, which provides in section 2 that the lands surveyed shall be divided by north and south and east and west lines, "unless where the line of the late Indian purchase or of tracts of land heretofore surveyed or patented or the course of navigable rivers may render it impracticable" (1 U. S. Stats., 466) and in accordance with the act of February 11, 1805, which makes a general provision that the boundary lines of surveys of the public lands of the United States "shall be ascertained by running from the established corners due north and south, or east and west lines, as the case may be, to the water course, *Indian boundary line,* or other external boundary of such fractional township."

2 U. S. Stats., 313, 314.

That Surveyor Mullett complied with his instructions appears not only from the field notes and plat of the survey above referred to, but from the testimony of expert witnesses called by the complainant, as follows:

Daniel P. O'Hare, a draftsman in the General Land Office at Washington.

Record, 213 to 225.

John H. Batchelor, employee in the surveying division of the General Land Office at Washington.

Record, 225 to 233.

Joseph Ripley, civil engineer and general superintendent of the canal and locks belonging to the Govern-

ment at Sault Ste. Marie, and in charge of the improvements of the St. Mary's River.

Record, 240 to 242.

The act of 1850 provided for the survey of the village of Sault Ste. Marie into town lots, streets, avenues, public squares, and out-lots, after the adjudication of titles by the register and receiver, and provided further that after such surveys shall have been completed, the deputy who made the survey should "prepare a plat exhibiting, in *connexion* with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public lots, and also the out-lots, designating the lots reserved for military or other purposes, according to the extent and limits of the same, as fixed by the proper military officers, pursuant to the requirements of the second section of this act."

9 U. S. Stats., 471.

Such survey and plat were made by Thomas Whelpley in 1854 and 1855, as shown by the record; the field notes of said survey being defendant's Exhibit 18, found at pages 370 to 533 of the record, and the plat being complainant's Exhibit E.

Attention is particularly called to the fact that the act of 1850 did not authorize Whelpley to resurvey or change the lines of the public survey made by Mullett in 1845, nor did it authorize him to survey any reservations, but only to survey the village lots, streets, avenues, and squares, and then to prepare a plat showing the relation to the reservations, "*in connexion with*

*the lines of the public surveys,"* of such lots, streets, avenues, and squares.

Reference to the plat will show that he performed the duty imposed by statute, but made two mistakes in so doing—first, in following the mistake of the register and receiver in not including in the reservation for public uses the triangular strip north of the 400-foot canal strip granted to the State, and, second, in showing on his plat a different meander line along the south shore of the strait and the north boundary of the Indian reserve, or reservation for public uses, from that established by the public surveys of Mullett in 1845, which he had no authority to change.

Complainant's exhibit No. 37, (record 215).
Addition to record, Map 9.

Reference to the field notes, however, will show that nowhere in those notes are included any survey of the Indian reserve, and in refraining from such survey Mullett clearly recognized his statutory duty.

The defendant claims that certain stitched sheets produced in evidence from the State land office at Lansing are a portion of the field notes of the Whelpley survey, although they are not entitled, dated, or sworn to and bear none of the usual marks of field notes. Such sheets contain a reference to the courses and distances shown on the Whelpley map meandering the north boundary of the Indian reserve. But it clearly appears from the testimony of the expert witnesses introduced by complainant and by cross-examination of the witnesses introduced by defendant that such sheets are not official field notes of survey, but mere

computation sheets for ascertaining areas, and that they were doubtless used by Whelpley in performing his duty of making the plat after his survey had been completed. See testimony of—

Dorr Skeels, record, 704 to 712.

Francis Hodgman, record, 712 to 719.

Joseph Ripley, record, 727 to 729; 734 to 736.

The above witnesses were introduced by complainant in rebuttal of the testimony of—

Luke L. Derocher, see cross-examination, record, 261, 262.

Byron J. Carnes, see cross-examination, record, 538 to 556.

Wells G. Brown, see cross-examination, 557, 558.

In the cross-examination above referred to, defendant's witness Brown, who is deputy register of the State land office at Lansing, testified that he would not be willing to certify said stitched sheets, or so-called paper pamphlets, as forming a part of the Whelpley survey; and in cross-examination of defendant's witness Carnes, letters were introduced from Moses Hooper, Esq., of defendant's counsel, showing the ineffectual attempts by him to obtain such certification. The presence of said paper pamphlets in the State land office is accounted for by the fact that when the surveyor-general's office at Detroit was closed, in 1857, his records and all papers relating thereto were turned over to the State of Michigan.

Record, 760 to 763.

It appears conclusively from the record that Whelpley never made a survey of the land included in the

Chandler patent, and that Mullett never did so, and it does not appear that anyone else ever did so. The official plat of the Mullett survey shows that he closed his lines on the various reservations in accordance with law. Whelpley had no authority to resurvey Mullett's lines, and his field notes show that he did not do so.

That the lands within the exterior boundaries of the reservations shown by the Mullett survey were not surveyed by Mullett or Whelpley is shown by the fact that when the Indian agency reservation (which is totally distinct from the Indian reserve and lies a very considerable distance to the eastward thereof) was no longer needed for public purposes, an original survey of said lands had to be made by the Commissioner of the General Land Office, as *ex officio* Surveyor-General, under the provisions of the act of Congress approved January 22, 1853. See complainant's Exhibit 61, which is the official map of such survey, approved November 14, 1873, and the correspondence relating thereto.

Record, 737, 741, 742.

Addition to record, Map 10.

See also the papers relating to the patenting of said land on November 10, 1874, to James P. Pendill.

Record, 737-739;

Record, 328-330.

The State land office furnished in 1884 to the United States canal authorities a certified copy of the Whelpley field notes, in response to a request by the Engineer's Office for a copy for *all* the field notes of the Whelpley survey.

Record, 719, 724.

Such field notes do not contain the meander found in the so-called paper pamphlets.

That lands embraced in an Indian reserve are not officially surveyed by the running of the exterior boundaries thereof is shown by a decision of the Land Department introduced in evidence.

Record, 793, 794.

It is apparent, therefore, that the land embraced in the Chandler patent has never been surveyed as a part of the public lands of the United States.

## V.

## SAID LAND NOT SUBJECT TO LOCATION WITH PORTERFIELD SCRIP.

### A.

### Lack of Legal Survey.

The act of Congress of April 11, 1860, authorizing the location of Porterfield scrip provides:

"That the Secretary of the Interior be, and he is hereby, authorized and required to issue to William Kinney and Thomas J. Michie, executors of the last will and testament of Robert Porterfield, deceased, a number of warrants, equal to six thousand one hundred and thirty-three acres of land, *according to the usual subdivisions of the public surveys,* in quantities not less than forty acres; to be by them *located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location* within any of the States or Territories of the United States where the minimum price for the

same shall not exceed the sum of one dollar and twenty-five cents per acre; *to be selected and located in conformity with the legal subdivisions of such surveys,* and appropriated according to the directions contained in the last will and testament of the said Robert Porterfield, deceased, in the same manner and for the purposes directed in regard to the lands which were lost by the said legal representatives in the action with Clark and others, as decided by the Supreme Court of the United States."

12 U. S. Stats., 836.

As shown in the preceding subdivision hereof, the land embraced in the Chandler patent was never surveyed into "the usual subdivisions of the public surveys," or at all. Inasmuch as this fact is, and was at the date of Chandler's application and patent, a matter of record in the public archives of the United States in the General Land Office at Washington, of which Chandler and his grantees were bound to take notice, the patent issued to him was void. The land was not subject to such disposal, and the mistaken former view of the land officials of the United States that it was so subject could not make it so.

Counsel for complainant are not aware of any court decision in which the location of Porterfield scrip on unsurveyed land is involved. But the law and its application to such lands is very clearly stated in a decision rendered by the Secretary of the Interior in Hosmer *vs.* Denny, a certified copy of which was introduced in evidence by complainant (record, 251), to which reference is craved. In that case, as in the one at bar, the land was not included within the official survey of the

township. The application for patent was denied, the Secretary of the Interior holding:

"These provisions are plain and unambiguous. The scrip, or warrants, provided for can only be located on public lands that have been surveyed—that is, surveyed under the authority of the Government of the United States. The act specifically and clearly limits the selection and location of such scrip to surveyed lands in conformity with the legal subdivisions of the United States public surveys.

"Whether lands have been surveyed by the authority of the United States is a question of fact that must be conclusively determined from the records of your office."

Land Decisions, vol. 23, pages 319, 321.
Record, 251, 253, 254.

No title passed, therefore, by the Chandler patent.

It seems to us, furthermore, that the Chandler title is confronted with a fatal dilemma. It has already been shown that surveyor Mullett, who subdivided the township, did not survey the land later included in the Chandler patent because the statute and his contract with the United States and his instructions under his contract forbade him to do so. Whether Whelpley actually ran survey lines around the Indian reserve is a disputed question of fact between the parties hereto, as to which we think the appellant has conclusively shown that he did not, as well as the further proposition that, if he did, he did so without authority of law, because his survey was made in 1854 and 1855 and the Indian reserve or easement did not cease to exist until September 10, 1856, and was therefore still subject to

the inhibition of the statute against extending the public surveys therein, and also because the act of September 26, 1850, authorized him to survey only the *village* of Sault Ste. Marie. But, however that may be, the dilemma arises as follows:

1. If Whelpley did not survey the existing Indian reserve, according to the system of public land surveys, the land, as above shown, was not subject to location with Porterfield scrip.

2. If Whelpley did legally survey the still existing Indian reserve, he surveyed it as a part of the village of Sault Ste. Marie, and section 9 of said act directed the Commissioner of the General Land Office "to order into market, after public notice of at least two months, all vacant lots, or lots to which a claim may be rejected, and to sell the same for cash to the highest bidder." Section 10 provided that the net amount of such sales, after deducting all expenses incident to the execution of the act, should be paid over to the village of Sault Ste. Marie to be expended in the improvements of streets and the erection of public buildings.

Under either horn of the above dilemma the land was not subject to location by Porterfield scrip.

## B.

### No Price Established for Said Land.

The Porterfield act of April 11, 1860, permits the warrants therein authorized only "to be * * * located on any of the public lands * * * within any of the States or Territories of the United States where

the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre."

12 U. S. Stats. 836.

On July 2, 1864, Congress passed an act providing:

"That whenever any reservation of public lands shall be brought into market under existing laws, it shall be lawful for the commissioner of the general land office to fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of."

13 U. S. Stats. 374.

Upon revision of the statutes, this provision was made mandatory, as follows:

"Whenever any reservation of public lands is brought into market, the Commissioner of the General Land-Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of."

Rev. Stats. U. S., Sec. 2364.

If, therefore, the land embraced in the Chandler patent was ever brought into market, it was incumbent upon the Commissioner to fix a price, not less than such minimum for its disposal.

Conversely, if the Commissioner did not fix a price, the land was never brought into market.

The record nowhere shows that a price was ever so fixed or that the land was brought into market, but, on the contrary, the complainant offered in evidence the proclamation of the President, following and in pursuance of the vacating of the temporary reservation of

April 3, 1847, in which said land, together with the other land which we contend is still in a state of reservation, was carefully eliminated from the lands so brought into market. In the order of the President of December 9, 1852, releasing from reservation certain tracts which had been so temporarily reserved (record, 160-163) no lands appear which are situated in the township in question and in the President's proclamation of May 18, 1853, no lands were included in sections 4, 5 and 6 of this township.

Record, 800.

This was evidently because said sections had been included in the specific reservation of September 2, 1847, shown in red on the map accompanying complainant's exhibit No. 12, and reproduced as Map 3 of the Addition to the transcript of record herein.

The lands lying south of section 6, in the north half of said township, which had been temporarily reserved on April 2, 1847, were, however, included in said proclamation, the purpose of said temporary reservation having been accomplished.

Record, 800.

But if section 6 was not brought into market it follows that no price whatever was fixed therefor, or for any part thereof, by the Commissioner under the provisions of Section 2364 of the Revised Statutes. And if no price was fixed, then the land was not subject to location by Porterfield scrip, because the act authorizing the location of said scrip limited such location to lands "where the minimum price for the same shall not

exceed the sum of one dollar and twenty-five cents per acre."

12 U. S. Stats. 836.

Said location was therefore made without authority and was as ineffective to pass title as if said scrip had been located upon the Capitol Grounds at Washington. The patent issued thereon was absolutely void.

## C.

## Said Land Otherwise Appropriated at the Time of Such Location.

The Porterfield act of April 11, 1860, permits the warrants therein authorized only "to be * * * located on any of the public lands * * * which have not been otherwise appropriated at the time of such location."

### (1) Effect of the Military Reservation.

We have herein shown that the land embraced in the Chandler patent was, at the date of his location and patent, and still is, reserved for public uses.

But even if such reservation had been released, as claimed by the appellee, such release would not authorize the location of Porterfield scrip on the land which had been embraced therein. It has been the wise policy of Congress from an early date to withhold from disposal, under land laws having a general application, all lands which had been withheld from disposal by reservation. The early policy of the government was

to regard the public lands as a source of revenue and it is obvious that lands which had remained in a state of reservation while the country around them became occupied by the advancing tide of migration acquired a greater value. In such cases, therefore, in order to obtain more revenue, it was the practice of the government to expose such lands for sale at public auction at some time after the reservation had been extinguished.

On June 12, 1858, Congress passed an act providing that, with the exception of lands in Florida,—

"All the existing laws, or parts of laws, which authorize the sale of military sites which are or may become useless for military purposes be, and the same are hereby, repealed, and said lands shall not be subject to sale or pre-emption under any of the laws of the United States."

11 U. S. Stats. 336.

The reservation at Sault Ste. Marie was originally established in 1822 for military and other purposes. Our contention is that, prior to the act above cited, the particular land here in question ceased to be reserved for military purposes and remained in a state of reservation for other uses. But if it had previously been reserved for military purposes, as stated by General Brady on June 19, 1844, (record, 93) and had been released on December 9, 1852, as claimed by the appellee, the tract became subject to the provisions of said act.

The word "sale" in the act above cited, we submit, includes the location of a Porterfield warrant under the circumstances of this case.

Culver *vs.* Uthe, 133 U. S. 655, distinguishing Iowa *vs.* McFarland, 110 U. S. 471.

The pre-emption act of September 4, 1841, (5 U. S. Stats. 453) contained a somewhat similar prohibition, providing that no "Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act * * * shall be liable to entry under and by virtue of the provisions of this act." That act came before this court upon an attempt to obtain, under the pre-emption law, the very land later embraced in the Chandler patent and the title so attempted to be acquired was held to be invalid.

Spalding *vs.* Chandler, 160 U. S. 394, 402, 407.

**(2) The Land Within the Limits of an Incorporated Town.**

On May 29, 1879, the village of Sault Ste. Marie was incorporated (or re-incorporated) by a special act of the legislature of Michigan. Said act was introduced in evidence by the complainant.

Record, 91, 92.

By said act all of fractional section six, which contains both Islands 1 and 2 and the land on the shore included in the Chandler patent, was embraced within the limits of the village. We contend, therefore, that such land was "appropriated," in a legal sense, at the time of Chandler's location and patent.

We have already, in this brief, called attention to the fact that Chandler attempted to secure, by his location of 9.10¾ acres, the fee simple title to a tract of land included in a tract containing 36½ acres which had cost

the United States $17,475, merely to extinguish an easement thereon.

11 U. S. Stats. 172.

In other words, he attempted to obtain, in exchange for scrip locatable upon lands worth $1,25 per acre, the fee simple to land a mere easement upon which was worth $478.77 per acre.

Furthermore, the land in his patent was, at the time of his location, estimated to be worth $100,000.

Record, 174.

In the very able opinion of the Secretary of the Interior, dated January 31, 1883, denying Chandler's right so to locate, he said:

"A question quite like the present one was considered at length by my predecessor, Secretary Schurz, in the case of Valentine *vs.* City of Chicago, (6 C. L. O., 22), which involved the location of Valentine scrip. That scrip may be located on unoccupied and unappropriated lands of the United States, whether surveyed or unsurveyed. That scrip was given for land in place (a Mexican grant) lost because of the failure of the owner to make proof of his claim before the board of commissioners under the act of 1851. At the time the scrip was authorized by Congress a populous town had been built upon a part of the lands which had been thus lost, and the other had been settled upon and improved. Valentine had in no manner participated in the settlement of the lands, nor contributed to their enhanced value. At the time that he should have asserted his claim the lands were unimproved and unoccupied, and Congress gave him lands in place of them. My predecessor, in his decision of the case, says:

" 'The equitable measure of value would be the land in a wild state, stripped of the valuable improvements made by others. Looking to the equitable intention of the lawmakers, I am of the opinion that it was intended that this scrip should be located upon any unoccupied and unappropriated public lands, not mineral, which were in a state of nature; and I do not think that Congress intended that Mr. Valentine or his assigns should be allowed to locate said scrip in the business center of one of our great cities, and thus absorb its streets, parks and public improvements.' "

"The **Porterfield scrip** was given by Congress in place of lands lost on account of prior entries, and upon which, at the time the scrip was authorized, had been built the city of Paducah, Kentucky. At the time Porterfield made his entries in 1784, under his military warrants, of the lands lost by earlier entries, such lands were, as near as I am able to ascertain, substantially in a state of nature, and neither he nor his executors to whom the scrip was issued had contributed to the greatly enhanced value of the property, which Porterfield had so lost—or rather had failed to acquire.

"What my predecessor has said in reference to the Valentine scrip is substantially applicable to the Porterfield scrip. I do not think it was the intention of Congress that the scrip in question should be located upon lands of the character of that here in controversy, but that the intention was that it should be located upon the public lands in a state of nature."

Record, 174, 175.

This decision was quite in line with that of Mr. Justice Miller, construing the pre-emption and townsite acts, in Root *vs.* Shields, which has been so frequently quoted with approval by this court.

"The public sales of lands are often delayed long after a large section of territory has been opened for settlement. This is in order to enable settlers to enjoy the preference in acquiring the more valuable tracts. And these sales are made in parcels of not less than 40 acres each, and therefore do not afford an appropriate means to claimants of small lots for acquiring title thereto. Congress accordingly provided this mode of relief to such parties, expressly restricting the advantages which it granted to lands actually occupied, and to 320 acres. The status of the remaining lands within the corporate limits was untouched. They could not be entered under this act, nor could they any more after than before the passage of it be pre-empted by an individual. The title to them could only be acquired at public sale.

"No one of the reasons urged on behalf of the defendants against giving effect here to the clear and express provision of the law, that lands within the limits of an incorporated city should not be subject to pre-emption, is tenable. But *if we look to the policy of the provision,* we are led to the same conclusion.

"Whenever a town springs up upon the public lands, adjoining lands appreciate in value. The reasons are obvious, and the fact is well known. So too when a railroad is built through a section of country, the same result follows. So too in respect of lands which have been reserved for the use of an Indian tribe, when the Indian title is extinguished, the same may be said. While such lands are held as a reserve, population flows up to their boundaries and is there staid; it of course constantly grows more and more dense, so that when the reserve is vacated, the lands have increased in value, and are always eagerly sought after. The other classes of lands mentioned in the exception, as for instance those on which are situated any known salines or mines, have some intrinsic value above others.

"Now all these classes of lands are excepted from the operation of the act, and for the one common and obvious reason, that being of special value, the government desires to retain the advantage of their appreciation, and is unwilling that any individual, because of a priority of settlement, which certainly can be of but brief duration, should, to the exclusion of others equally meritorious, reap benefits which he did not sow.

"This is as true of lands within the limits of an incorporated city, as of any other of the classes mentioned in the exception. And it is no answer to this view to suggest that lands thus excluded from preemption are not occupied for a town. They are included within its limits by the local legislature, because likely to be required for such occupancy. And it is this fact, and their proximity to the town, which gives them special value. This very circumstance of their situation brings them into the classes of lands mentioned.

"The lands were not, at the time Shields first asserted a pre-emption claim thereto, subject to entry under the act, and the entry which he made was **illegal and void.**

* * * * * * *

"Besides, these defendants were bound to know the law. They were bound to know that these lands were within the limits of the city; and that lands within the limits of a city cannot be pre-empted. Knowing these facts, they knew that Shields' entry was void. They did not purchase without notice.

"Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry, after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before. And as he had none, he could convey

no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all."

Mr. Justice Miller, in Root *vs.* Shields, 20 Federal cases, pages 1166-1167.

Quoted with approval by this court in Spalding *vs.* Chandler, 160 U. S. 402.

It is true that later, on June 8, 1883, the Secretary of the Interior changed his mind and permitted the Chandler location to go to patent. His subsequent decision was also introduced in evidence by the complainant.

Record, 176-178.

But the second decision of the Secretary was a mistake of law and a mistake in the application of facts resting in record in the archives of the government at Washington and was inoperative to confer any legal rights under the patent issued in accordance therewith.

"Why should an intention be imputed to Congress to exclude actual settlers from saline lands, but leave them open to private entry by *speculators*. The legislation upon the subject of public lands has always favored the actual settlers, but the construction contended for would discriminate against them and in favor of *a class of persons whose interests Congress has never been swift to promote.*"

Morton *vs.* Nebraska, 21 Wall. 671.

Eldred *vs.* Saxton, 19 Wall. 189.

## VI.

## THE INTEREST OF THE UNITED STATES IN THIS SUIT.

Paragraph XVII of defendant's answer to the bill of the United States alleges:

"That the object of this action to declare that complainant is the owner of Islands 1 and 2 is not that the same may in any way be devoted to public uses of the United States, nor that the United States may be relieved of embarrassment in its relations with Great Britain. But, on the contrary, the object of this action is to aid the Michigan Lake Superior Power Company in an attempt to divert from the said upland of the defendant and from its said Islands 1 and 2 the waters of the St. Marys River, for which diversion an act of August, 1855, approved June 13, 1902, is claimed as authority."

Paragraph XXVI repeats this charge as follows:

"That the object of this action to declare the title of Islands 1 and 2 to be in the United States is not to further or protect any interest of the United States, nor for the protection of any of its property, nor to vindicate its honor, nor to enable it to do justice to other persons or corporations, or to fulfill its obligations to the public, nor that it may be relieved of embarrassment in its relations with Great Britain. But, on the contrary, the object of this action is to aid the Michigan Lake Superior Power Company in an attempt to divert from the said upland of the defendant and from its said Islands 1 and 2 the waters of the St. Mary's River, for which diversion an act of Congress approved June 13, 1902, is claimed as authority."

So serious a charge against the officers of the United States needs some attention.

In United States *vs.* San Jacinto Tin Company, 125 U. S., 273, this court has held:

"The *interest* or *duty* of the United States must exist as the foundation of the right of action. Of course, this interest must be made to appear in the progress of the proceedings, either by pleading or evidence; and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail."

It seems, therefore, that the interest of the United States in the subject-matter of this suit, or its duty to bring this suit, would properly be an issue in this case, if properly denied by the answer. The answer, however, does not deny said interest or duty, but imputes a motive. The imputation of such a motive is an attack upon the good faith of the officers of the Government by whose direction the suit was instituted.

Without relying upon the technicality of the failure of the answer properly to deny any interest or duty of the United States in bringing this suit, we submit that such interest and such duty both exist, and that the charge of an ulterior motive, made by the defendant against the officers of the United States who brought this suit, is unwarranted, reckless and highly improper, as will appear from the following considerations.

## A.

### International Obligations of the United States.

We have already in this brief endeavored to show that, both by the law of nations and by specific treaties with Great Britain, the waters surrounding the islands in question are free and common to the subjects of both nations. It is the duty of the political department of the United States to resist, in the courts of the United States, any denial of that legal status. That is exactly what the officers of the United States who are charged with such duties have done in this case.

If the State of Michigan has, by legislative act or judicial construction, thrown doubt upon the public international character of the waters (which we do not believe) it is the duty of the officers of the Department of Justice to remove that doubt. If individual citizens claim that the law of Michigan extends the title of a riparian owner to the middle of these international waters, contrary to the belief of the political department of the United States, it is the duty of the officers of that department to resist such claim and to establish, if possible, the same rule in those waters that was announced by this court in the Chicago Lake Front case. For the status of international boundary waters cannot be left to the option of a border State of the Union.

The government of Great Britain, mindful of its obligations under the laws of nations and the treaties herein referred to, has maintained as to these waters the principle for which we contend.

See the testimony of William M. German, K. C. (rec-

ord, 79 to 90), and particularly page 83, where he says that the law prevailing in the Province of Ontario as to the Great Lakes and their adjoining waters "is exactly the same as defined by the decision of the Supreme Court" in the Chicago Lake Front case.

It is evident, therefore, that whether or not the officers of the political department of the government are correct in their views, it is their duty to maintain the law, as they conceive it to be, by bringing this suit. We submit that it is also the duty of the United States to Great Britain to bring this suit, for the purpose of establishing the correct principle.

It is a matter of public knowledge that an international commission is now sitting to investigate and report upon the conditions and uses of these very waters, *i. e.*

"to investigate and report upon the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada, including all of the waters of the lakes and rivers whose natural outlet is by the River Saint Lawrence to the Atlantic Ocean; also upon the maintenance and regulation of suitable levels; and also upon the effect upon the shores of these waters and the structures thereon, and upon the interests of navigation, by reason of the diversion of these waters from or change in their natural flow; and, further, to report upon the necessary measures to regulate such diversion, and to make such recommendations for improvements and regulations as shall best subserve the interests of navigation in said waters."

Act of June 13, 1902, 32 U. S. Stats. 373.

The expenses of the American commissioners are paid from the appropriation for "St. Marys River at the Falls."

*Id.*

The commission so appointed consists of "three members from the United States and three who shall represent the interests of the Dominion of Canada," and the act directed that the President should appoint, as the American members of the commission, "one officer of the Corps of Engineers of the United States Army, one civil engineer well versed in the hydraulics of the Great Lakes, and one lawyer of experience in questions of international and riparian law."

32 U. S. Stats. 373.

The commission has made several reports, the principal of which are:

Progress Report, December 1, 1905.
Second Progress Report, December 1, 1906.
Third Progress Report, December 1, 1907.

In the Second Progress Report appears the following:

"Upon the organization of the International Waterways Commission it found the most pressing matter coming within its jurisdiction was the regulation of the use by private corporations of the waters of St. Marys River in connection with the control of those waters for the protection of navigation at present, and in the future. The Commission, therefore, proceeded to an investigation of the local conditions by special committee and the study of all data obtainable. After thoro

consideration of all the information which could be obtained, and after hearing all parties interested in the use of the waters at Sault Ste. Marie, including navigation interests, the Commission is satisfied that the rules recommended herein, governing the use, or interference with the natural flow, of those waters, will do entire justice to private interests, and, at the same time, fully protect commerce and navigation.

"The extent of the commerce on the Great Lakes is well illustrated by the official statistics of the amount of freight which past the locks at Sault Ste. Marie during the season of navigation of 1905, which amounted to more than 44,000,000 net tons. To this should be added the local tonnage, which is considerable, and the large traffic between ports on Lakes Michigan and Huron and the East, making a total lake traffic of between 50,000,000 and 60,000,000 tons. The immense importance of transportation by the Great Lakes, and the consequent necessity of protecting and facilitating it in the interest of the public becomes apparent when we consider that the ability to transport by lake must have resulted during the season of 1905 in saving many millions of dollars. The average rate for transportation of Lake Superior freights in 1905 was $0.00085 per ton-mile, while from the best information obtainable the transportation rate by rail between Lake Superior points and the East is not less than $0.004 per ton-mile. The ton-mile saving over railroad transportation was, therefore, at least $0.00315. The average haul of the freight mentioned was 833.3 miles. The total number of tons of freight that past the Sault locks in 1905 was 44,270,680, and it follows that in this year there was an aggregate saving thru lake transportation on Lake Superior, thru freight alone, of approximately $116,000,000. In other words, by transporting the Lake Superior freight on the Great Lakes,

$116,000,000 was saved, in 1905, to the producers of raw materials, the manufacturer and the consumer, and the saving to manufacturers has made it possible for them to supply the home markets and compete in those of foreign countries.

"The growth of commerce upon the Great Lakes in the past few years, and its prospective immense increase in the future, has convinced the Commission that steps should be taken, not merely to preserve the lake levels, *but to retain absolute control of all waters which go to maintain those levels, and of all lands which may be useful or necessary, at present or in the future, to increase navigation facilities.* The Commission is, therefore, decidedly of the opinion that the Governments of the United States and Canada should act in unison in controlling, absolutely, any and all diversions at Sault Ste. Marie, so that the waters of the river may be available at any time when needed for navigation."

Page 11.

Thereupon the commission made the following recommendations:

"1. That no permits shall be granted for the use of the waters of St. Marys River, or for the erection of structures in, under, or over, or the occupation in any manner of, the said waters until plans have been submitted to the Commission for its investigation and recommendation, and the use of the waters under such permits shall not be allowed except upon compliance with the rules hereinafter recommended.

"2. The Commission further recommends that no grants, permits, or concessions should be made, which directly or by operation of law, may, in any manner, affect the right of the United States or of Canada, to control the bed of the St. Marys River, below high-water mark, and especially that none should be made

which, legally or equitably, may be the means of adding to the expense of acquiring lands or rights for the purpose of making improvements in aid of navigation, or which may give an equitable right to compensation in case of the removal of structures in said river.

"3. That steps be taken to increase the lockage facilities at the Sault Ste. Marie without unnecessary delay.

"4. That the Governments of the United States and Canada reserve all water necessary for navigation purposes, at present or in the future, and the surplus shall be divided equally between the two countries for power purposes.

"5 As the Commission regards the interests of the United States and Canada in the preservation of the lake levels, and in the improvement of the channels and the conservation of the water supply for purposes of navigation as identical and as incapable of efficient protection without joint and harmonious action on the part of the two Governments, it recommends that the rules hereinafter set forth be adopted, and that a joint commission be created to supervise their enforcement, or that such powers be vested in the existing International Waterways Commission, subject to such restrictions and reservations as may be deemed advisable."

Page 4.

The same commission is also considering the serious questions arising at Niagara Falls, and at other places on the international boundary.

It is also a matter of public knowledge that since this suit was brought a serious international complication has arisen on waters forming a portion of the boundary of the United States and Canada, viz, the St. Johns River, arising from the occupation of said waters by individuals for lumbering purposes, in such

manner as to interfere with the general floatage of the stream. There is no question that under the treaty relations which exist between Great Britain and the United States, and which are now in force, citizens of Great Britain have the right, if they so desire, to float lumber rafts, log rafts, or boats down the rapids opposite Islands Nos. 1 and 2 and between said islands and the shore.

It also appears from the testimony in the case that even now this channel is obstructed by the works of defendant company.

Testimony of Chandler, record, 566.
Testimony of Dunbar, record, 302, 303.
Testimony of Kingan, record, 303.

See also the four photographs of said islands, found on pages 679 to 681 of the record, and map and chart exhibits in case.

The duty of the United States is, moreover, no less to its own citizens, in maintaining the public character of the waters.

**B.**

**The Locus Needed for Works in Aid of Commerce.**

In the preceding subdivision we submit that the duty of the United States to bring this suit clearly appears. It remains to consider whether or not the United States has any direct interest in the result of this suit. If either the *duty* or the *interest* appears, the requirements of the San Jacinto case, *supra*, are satisfied.

The defendant appellee claims that the specific reservation of these islands by the President on October 12,

1889, was "for use in connection with the improvement of St. Marys River at Hay Lake channel," as stated in the letter of the Secretary of War to the President, on which the President's order of reservation was indorsed, and has attempted to show in testimony that such islands have no relation to the improvement of Hay Lake channel. The record shows, however, that the reservation of said islands was sought by the engineer officers of the United States *"for canal purposes."*

See letter of General Poe to the Chief of Engineers, dated May 19, 1885, in which he says:

*"The islands are useful to the canal, and in case of its further enlargement as proposed will be particularly so; even if they were not useful, the title should be retained in the United States, since their ownership by private individuals might be made the basis of obstructions to the canal, the facilities of which are greatly encroached upon already."*

Record, 788.

See also General Poe's report to the Chief of Engineers, dated September 26, 1888, in which he says, in urging such reservation:

*"The necessity for this action at an early date is greatly increased by the fact that the contingency referred to in my report of May 19, 1885, has since arisen, and we are now actually engaged in the further enlargement of the canal.*

*"The canal requires the reservation of every square foot of public land yet remaining in its vicinity."*

Record, 790.

See also the request of General Casey, addressed to the Secretary of War on October 10, 1888, that these

very Islands 1 and 2 "be formally reserved from sale, *all said land being required for canal purposes in consequence of the enlargement now in progress of the St. Marys Falls canal.*"

Record, 791.

See also the letter of the Acting Secretary of War, addressed to the Secretary of the Interior on October 12, 1888, stating that application has on the same day been made to the President for the reservation of Islands 1 and 2 *for canal purposes.*

Record, 792.

The United States Army Engineer officers whose correspondence is noted above were in charge of the interests of the United States at this point and their judgment, as to what are the interests of the United States, must be accepted as conclusive.

The Government issued in 1903 a pamphlet entitled "Statistical Report of Lake Commerce, Passing through Canals at Sault Ste. Marie, Michigan and Ontario during the season of 1903." This public document was put in evidence, under stipulation, record 257, and an extract is printed as a footnote hereto.*

*The growth of the Lake Superior commerce during the past half century has been phenomenal. The estimated amount and value of articles which crossed the portage of Sault Ste. Marie in 1851, to and from Lake Superior, was 12,600 net tons, valued at $1,675,000.

In 1861, a decade later, the traffic through the State locks was 88,000 net tons, valued at $6,000,000.

In 1871, 585,000 net tons, valued at $13,000,000.

In 1881, through the State and Weitzel locks, 1,567,741 net tons, valued at $30,000,000.

(See continuation of foot-note on next page.)

It shows that the average increase in tonnage of each year's traffic through the canals at Sault Ste. Marie *over that of the preceding year,* which is a geometrical ratio, from 1851 to 1900 has averaged sixteen and two-thirds per cent.

Astonishing as these figures are, the developments since said report was issued in 1903 startle the imagination, for it appears by the annual report of the Chief of Engineers for 1907 that:

"Commerce is now about ninety-six times that of 1870, thirty-nine times that of 1880, six times that of 1890, and more than twice that of 1900."

Report of the Chief of Engineers, 1907, page 688.

During the period of navigation in 1906, embracing only two hundred and fifty-four days, the net tonnage passing Sault Ste. Marie amounted to 41,098,324 tons.

*Id.* page 690.

In 1907 the net tonnage amounted to 42,631,846 tons.

Statistical report of lake commerce through canals at Sault Ste. Marie, Michigan and Ontario, for the season of 1907.

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In 1891, through Weitzel lock, 8,888,759 net tons, valued at $128,178,208.

In 1901, through Weitzel, Poe and Canadian locks, 28,403,065 net tons, valued at $289,906,865.

Thus the percentage of increase in tonnage of each year's traffic over that of the preceding year has averaged as follows:

| | |
|---|---|
| 1851-1860 | 21 per cent. |
| 1861-1870 | 21 per cent. |
| 1871-1880 | 10¼ per cent. |
| 1881-1890 | 19 per cent. |
| 1891-1900 | 12¼ per cent. |
| Average, 1851-1900 | 16 2/3 per cent. |

At this rate of increase it is impossible to say how many new locks will be required, in addition to the present artificial aids to navigation, to accommodate the commerce of the Great Lakes. It is evident however that large additional facilities are already needed and that more will be required at an early date.

The reservation north of the line E, F, G, is now occupied exclusively by the canal grounds, except that portion included in the paper title to Chandler.

See testimony of Joseph Ripley, General Superintendent of the St. Marys Falls Canal.

Record, 237.

South of the line E, F, G, is the thickly settled portion of the city of Sault Ste. Marie, where it is impracticable to acquire, without great cost, space for additional locks, even if it were practicable, from an engineering standpoint, to locate them there.

At the time of the hearing in this case plans had been made for the building of a third lock, with appropriate canal approach, on the north side of the present locks and canal.

Record, 236, testimony of Superintendent Ripley.

Plans had also been made for a new lock to the southward (record, 238), although such construction would take longer and would be more inconvenient than on the north side (record, 249, 250). At that time Mr. Ripley testified that the new lock would probably be located south of the Poe lock (record, 238), although

such plan would involve the destruction of one of the existing locks (record, 250).

This was doubtless because the land located by Chandler lay immediately in the path of the plans for any lock to the northward of the existing locks.

Later, the Chief of Engineers recommended the building of the lock to the northward, in spite of the cost to the United States arising from the existence of the Chandler title. The estimated cost of acquiring the right of way for the construction of the lock to the northward was $50,000.

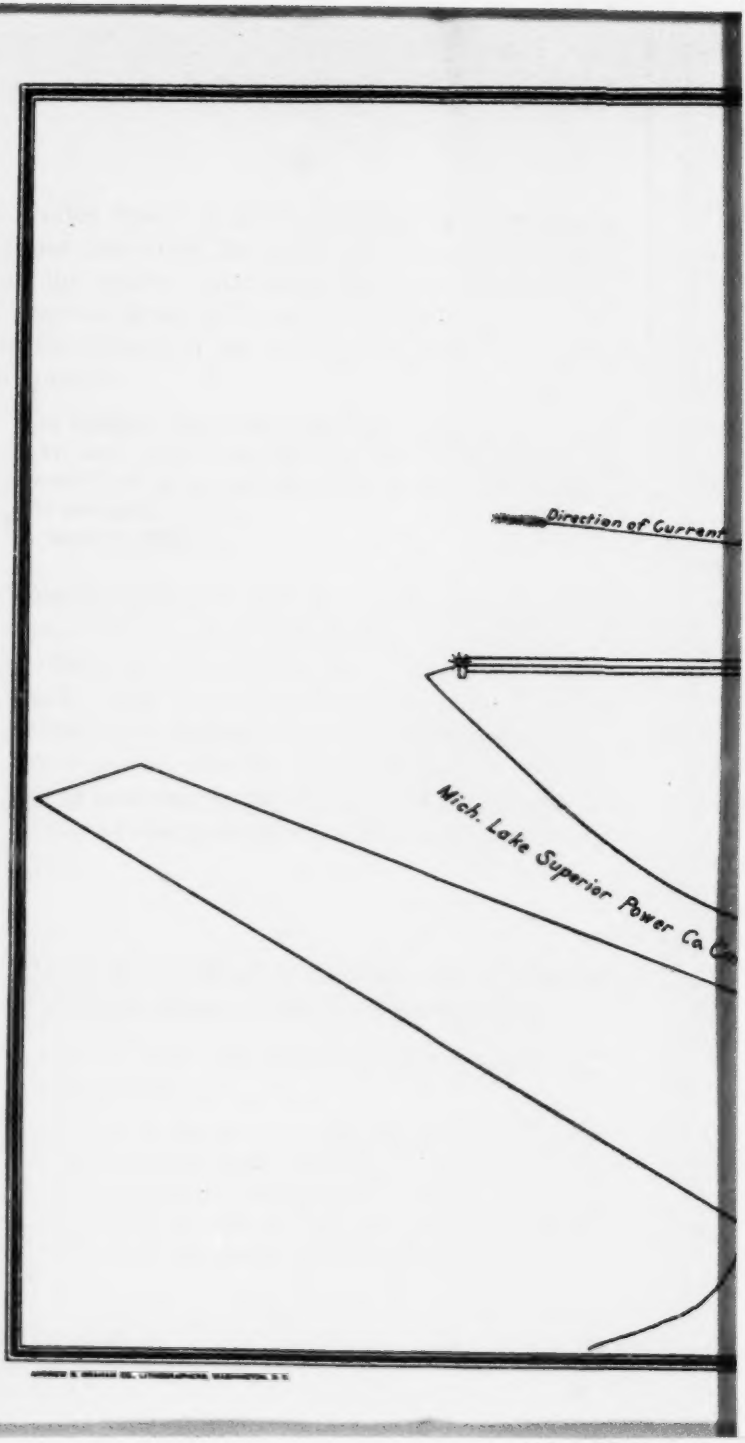
House Document No. 33, 59th Congress, 2d session, page 5.

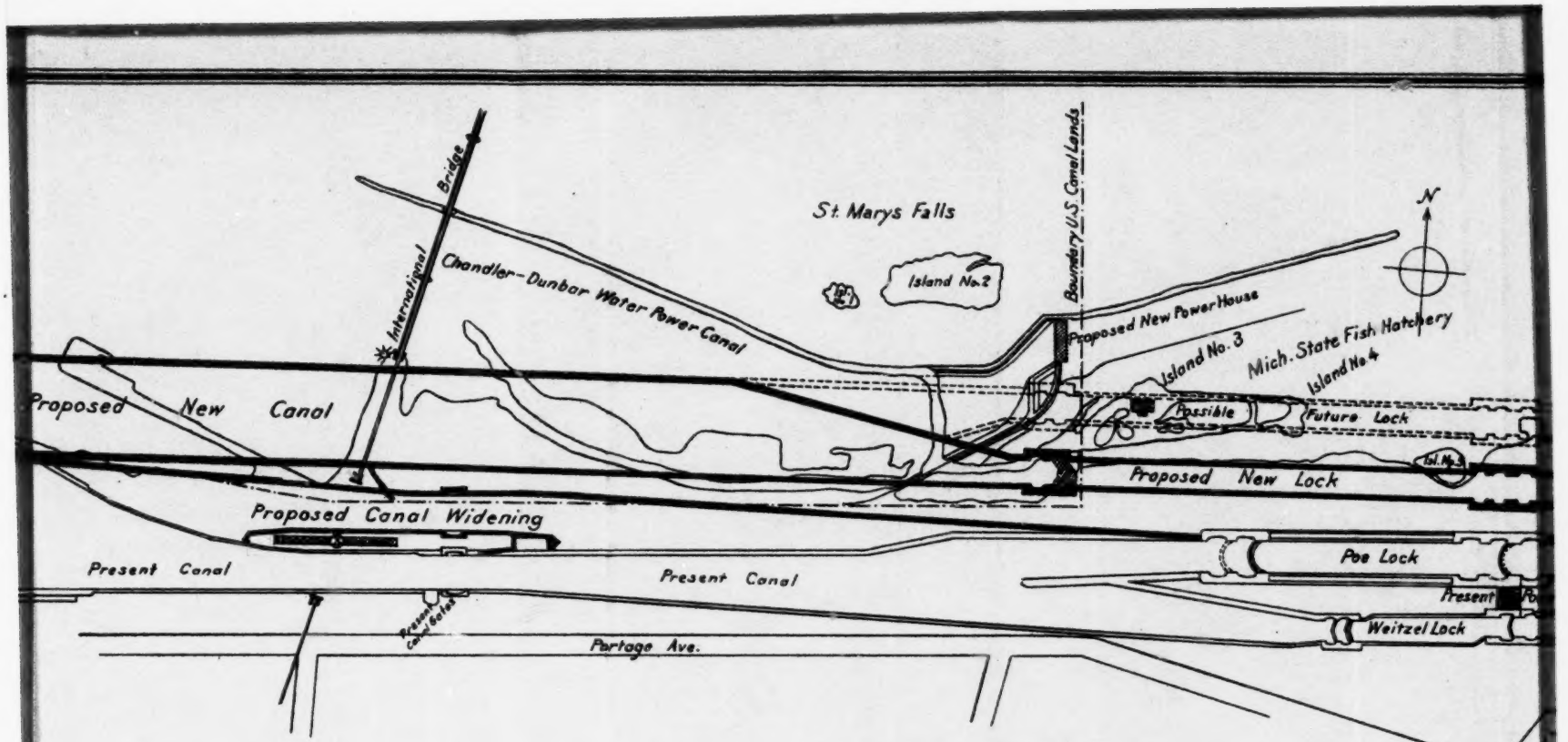
This was one of the results accruing to Chandler from his location on the land embraced in his patent, of Porterfield scrip which entitled him to take $11.38 worth of public land, as most of the land to the northward is included in his patent.

By the River and Harbor act of March 3, 1907, five million dollars was appropriated to build the new lock to the north of the existing locks according to "Plan No. 3," submitted by the Secretary of War.

34 U. S. Stats. 1098.

The map accompanying said "Plan No. 3" is attached hereto, and it will be seen therefrom that said construction requires the purchase from Chandler of the land embraced in his patent, unless the title acquired by his patent be held to be void. Thus the far-sighted wisdom of General Scott, General Brady, General Poe, General Weitzel and other army officers of


Direction of Current
Mich. Lake Superior Power Co




IMPROVING ST. MARYS RIVER.
Colonel Chas. E. L. B. Davis, Corps of Engineers, U. S. Army,
in charge.

Sketch of

# ST. MARYS FALLS CANAL

Showing

Proposed Lock North of Poe Lock

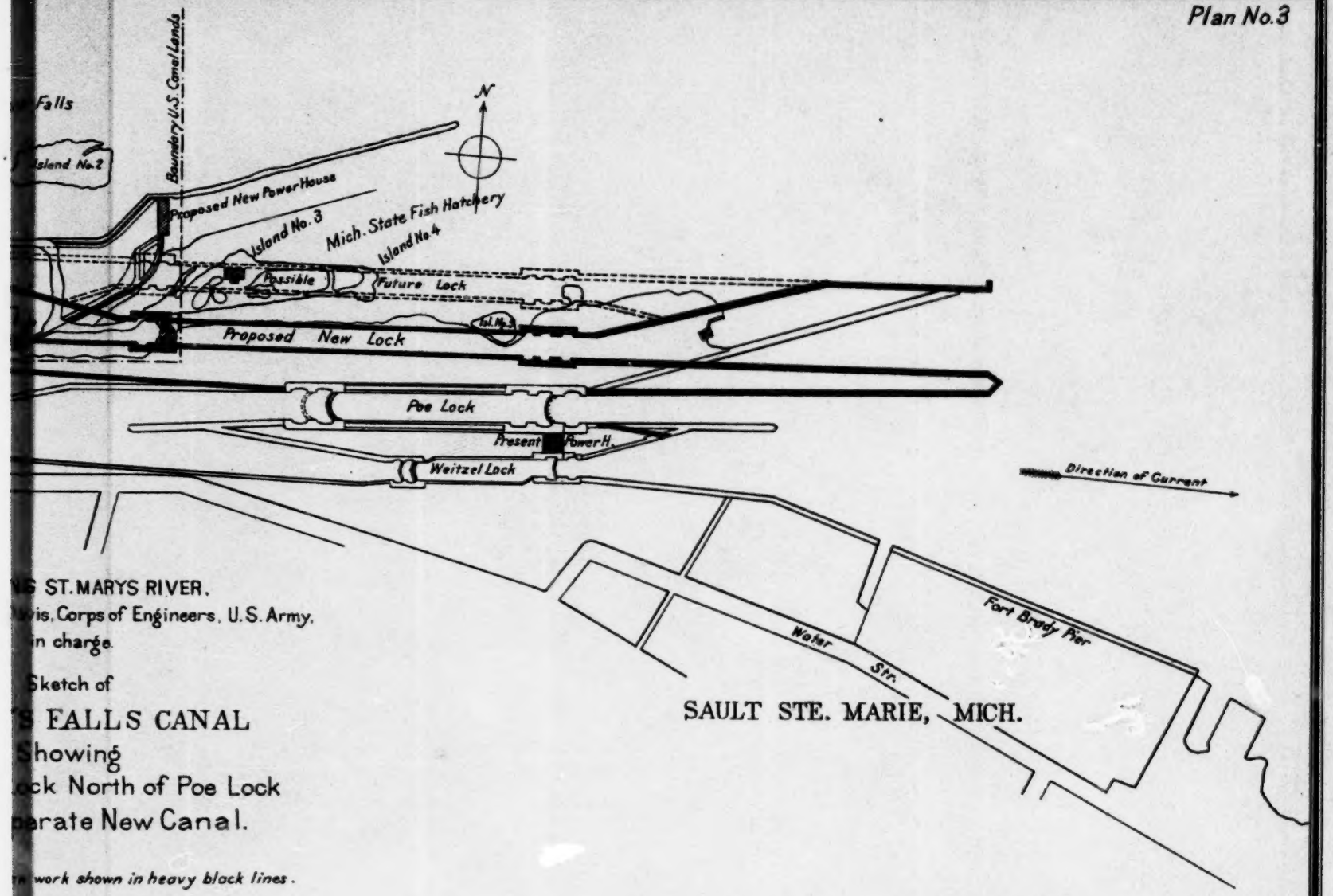
with Separate New Canal.

*Note: Proposed new work shown in heavy black lines.*

*Scale in feet.*

100 50 0 1 2 3 4 500 6 7 8 9 1000 FT.

Plan No.3




S ST. MARYS RIVER.
vis, Corps of Engineers, U.S. Army,
in charge.

Sketch of

S FALLS CANAL
Showing
ock North of Poe Lock
parate New Canal.

work shown in heavy black lines.

Scale in feet.

To accompany report of December 3, 1906.

H Doc 333 59 2

the United States is amply justified and their apprehensions regarding the intrusion of private interests upon the reserve established for these great public purposes is shown to be well founded.

In the opinion of the Court of Appeals the following appears:

"The further reservation for such purposes was as we have seen abandoned by the War Department. I have consulted upon the question as to what reservations it needed."

Record, 826.

It does not appear in said opinion who was consulted or when or where, but it is evident that by such consultation the court was misled.

Islands 1 and 2 lie directly in the path of future extensions to the northward of the existing lock system.

Thus it appears that the United States has a direct interest in maintaining title to said islands, in addition to its duty of maintaining the public character of the waters.

## C.

### Refusal by Circuit Court to Consider the Validity of Appellee's Alleged Title to Adjacent Shore.

The learned judge who heard this case in the Circuit Court held as follows:

"The patent to the shore or upland, issued December 15, 1883, to the defendant's grantor, is attacked in the bill for the purpose of defeating any claim of the defendants to these islands, but those allegations will not be considered by the court, as they raise no questions

which the United States has any interest in having determined in this suit."

Record, 45.

It has been shown above that, on the contrary, the United States has a most substantial interest in maintaining its title to Islands 1 and 2. It is true that, when the Secretary of the Interior originally requested the institution of suit, he had in mind, in resisting the claim of the Chandler-Dunbar Water Power Company to said islands, the single defense that said islands lay in public waters and were not subject to the riparian claim of Chandler. But when the Attorney General, in accordance with such request, began investigating the matter, he discovered, from the archives in Washington and elsewhere, that a further defense existed in the denial of the shore title upon which the claim of said company to the islands had its sole dependence. Such discovery was communicated to the Department of the Interior and, with the acquiescence and approval of that Department, the bill was so drawn as to include all defenses which were legally applicable.

See letter from the Acting Attorney General to the Secretary of the Interior, dated July 28, 1905.

Record, 53-55.

Reply of the Acting Secretary of the Interior, dated August 4, 1905.

Record, 55-56.

On April 21, 1903, the Acting Attorney General advised the United States Attorney at Grand Rapids as follows:

"As indicated by the wire instructions to you of to-day the Department has under consideration matters in connection with this case which are deemed of great importance and which are not touched upon in your bill,—matters that have been under investigation of Mr. Fox who will in due time, communicate with you relative thereto. It seems, desirable, therefore, that the bill drawn by you should be enlarged upon somewhat."

Record, 686.

Although said correspondence was submitted, on motion for re-hearing, to the district judge who heard the case in the first instance, he held, in denying said motion, that the facts so shown did not change his mind.

Record, 67.

The Court of Appeals, however, appreciating the fact that the interest of the United States lay, not only in maintaining the character of the public waters, but in preserving the title to Islands 1 and 2, considered the whole question, although they reached a wrong conclusion thereon.

## D.

## Employment of Special Counsel.

Counsel for the appellee, in denying the duty and interest of the United States in this suit, and to support the charge in their answer to the bill of complaint that this suit has been brought and prosecuted in behalf of private and not public interests, have persistently attacked the employment and conduct of the special

counsel who has been retained by the Attorney General in this litigation. Such attack is based upon the fact that said counsel is also counsel for the Michigan-Lake Superior Power Company, which is in litigation with the Chandler-Dunbar Water Power Company, in the State courts of Michigan, regarding the right to the use of water flowing from Lake Superior into the Strait of Saint Mary.

Record, 577.

Said litigation antedates the institution of the present suit by the United States against the Chandler-Dunbar Water Power Company.

Record, 636.

In said litigation in the State courts the Chandler-Dunbar Company, as in the present case, claims to be the owner of the shore land embraced in the patent issued to Chandler and of the bed of the waters northerly therefrom to the International boundary (record, 578) and seeks to enjoin the Michigan-Lake Superior Company from diverting any of the water flowing past said shore land and over such submerged land. It is evident, therefore, that the interest of the United States and that of the Michigan-Lake Superior Power Company, though for different reasons, lie in the same direction, viz: in denying the title of the Chandler-Dunbar Company to the bed of the Strait and in further denying its title to the shore land, to which said title to the submerged land is claimed to be a riparian incident. There was, therefore, no impropriety in the employment by the United States of counsel who was en-

gaged in investigating the same questions for private interests which were seeking the establishment of the same propositions of law. Nor was there any reason why the United States should not avail itself of the experience of such counsel, who is shown by the record to have been previously engaged in other cases involving similar questions of title in the immediate vicinity.

In these propositions both the Circuit Court and the Court of Appeals have concurred.

Circuit Court (record, 63, 64).
Circuit Court (record, 66, 67).
Circuit Court of Appeals (record, 819).

It is admitted by the United States that its special counsel is the attorney of the Michigan-Lake Superior Power Company, that the interests of said company in some particulars are identical with those of the United States and that the Government originally availed itself of the services of said attorney, at a nominal consideration, because he was specially qualified to assist in this litigation on account of his familiarity with the questions involved, arising from his former experience as an officer of the United States General Land Office and from his later experience as attorney in cases involving lands in the immediate vicinity of the lands involved in this suit.

Record, 691, 695, 696, 697.

Two of such cases are mentioned in the record.

*In re* John Torrent (record, 768).
*In re* Chase S. Osborn (record, 685, 695).

Neither of said cases involved either the islands or the upland involved in this case.

The Osborn case involved islands situated about fifteen miles southeast of the locus of the present controversy (statement before the Circuit Court by Mr. Fox, record 58, conceded to be true by counsel for defendant and appellee, record 63). The Torrent case involved land a mile to the west of the islands and upland involved in this cause.

Record, 795.

Another case mentioned in the record was the retaining of Mr. Fox by the Michigan-Lake Superior Power Company as advisory counsel in the suit brought against it by the Chandler-Dunbar Water Power Company, *in the State courts,* involving the right to the use of water flowing from Lake Superior into the Strait of Saint Mary.

> Statement of Mr. Fox, record 60, conceded to be true by counsel for defendant and appellee, record, 63.

When the Secretary of the Interior was considering the Osborn case, it was heard by Judge Van Devanter, now Circuit Judge for the Eighth Circuit and then Assistant Attorney General for the Interior Department. Mr. Osborn was represented by Mr. Fox, who made oral argument and filed a printed brief. Osborn claimed unsurveyed islands lying in the St. Mary's strait or river, many miles distant from the islands 1 and 2, here involved, and the question was whether the title to said other islands attached to the adjacent shore

by riparian right. At said argument Mr. Fox took the position that said islands lay in public waters and that the riparian incident therefore did not exist.

Record, 692 to 695.

At the same time the Department had under consideration the assertion of the claim by the Chandler-Dunbar Company against the United States, involving the title to Islands 1 and 2, here in controversy, said question having been raised by said company, as shown in this brief.

*Ante,* pages 6, 7.

When, therefore, the Department of the Interior requested the Department of Justice to institute suit to maintain the title to said Islands 1 and 2, the employment of Mr. Fox as special counsel was recommended, and a copy of his brief in the Osborn case was sent to the Attorney General with the request for the institution of this suit.

Record, 689 to 695, 695 to 696, 697.

The United States thereupon employed Mr. Fox, for the same reasons that induced his other clients to retain him, and his employment was, *at first,* at a nominal compensation (appendix to this brief, xxxiii) because the private interests above mentioned for which he was already counsel were so deeply concerned in the establishment of the principle of public waters.

At the hearing in the Circuit Court, however, it was urged by counsel for the Chandler-Dunbar Water Power Company that said special counsel had injected

into this case, for the benefit of his private clients, questions in which the United States had no interest, viz: the questions as to whether said company is the owner of the shore opposite Islands 1 and 2. Such suggestion was most unjust, for it is impossible to consider the question of title to these islands without also considering the validity of the shore title upon which title to the islands depends. The two departments of the Government which are specially concerned in this suit have concurred as to the necessity of trying all the questions involved.

See letter from the Department of Justice to the Department of the Interior and the reply of the latter Department.

Record, 53 to 56.

See also, particularly, the statement immediately made by special counsel for the Government at the argument in the Circuit Court, the admission by counsel for the defendant that the case has been under the direct charge of the permanent officials of the Department of Justice, and the remarks of the District Judge thereon.

Record, 57 to 65.

At the close of the interchange between counsel in the Circuit Court, the following statement was made by Moses Hooper, Esq., one of the counsel for the Chandler-Dunbar Water Power Company, concurring in the withdrawal by his colleague Arch B. Eldredge, Esq., of such charges:

"Mr. HOOPER [addressing the Court]: May I say one word in line with what you just suggested. We first

set this matter up in bar of this action. We did not then know of this letter of the Secretary of the Interior to the Department of Justice which was introduced in evidence by Mr. Fox. When that was introduced, nothing further was heard; no objection has been heard since that upon our part in regard to that matter."

Record, 65.

Notwithstanding the above statement the same charges and the same attack upon special counsel were renewed in the Circuit Court of Appeals.

Prior to the retaining of Mr. Fox by the Michigan-Lake Superior Power Company, in its controversy with the Chandler-Dunbar Water Power Company, William B. Cady, Esq., one of the counsel for the former company, had filed Porterfield scrip in the land department, in the attempt to locate thereby Islands 1 and 2 and a strip of land along the shore opposite said Islands, and the land within the area of Portage Street where it passes through the former Indian reserve. Said application of Mr. Cady was introduced in evidence by the defendant (record, 567 to 571). The defendant also introduced in evidence the decision by the Commissioner of the General Land Office rejecting said application (record, 571 to 577).

The evident object of such offer of evidence was to contradict the statement made by Mr. Fox in his communication to the Attorney General dated July 14, 1904, that his client, the Michigan-Lake Superior Power Company, made no claim to the subject-matter of the present suit.

Record, 692 to 695.

Said letter was written by Mr. Fox upon request of the Attorney General for information as to suits in which special counsel were then employed, Attorney General Knox having been succeeded in that office on July 1, 1904, by Attorney General Moody.

Said statement of Mr. Fox is, however, shown by the record to have been absolutely accurate. For it nowhere appears by the record that Mr. Fox was ever retained by Mr. Cady in that or any other matter, and it further appears that Mr. Fox was not retained by the Lake Superior Power Company until December 8, 1902, (record, 663, 664) while the application of Mr. Cady had been filed on November 26, 1901, (record, top of page 571 and top of page 573) and had been rejected by the Commissioner on May 15, 1902, (record, 571 and 572) and had been rejected on review on August 13, 1902, (record, 572 to 573).

By said later decision it appears that Mr. Cady's attorney, instead of being Mr. Fox, was Mr. F. W. McReynolds, of Washington (record, top of page 573).

The accuracy of said statement by Mr. Fox is also shown by the fact that, following and by reason of his employment by the Michigan-Lake Superior Power Company on December 8, 1902, and as a result of his investigations and advice (record, 636), said company had already, in September, 1903, filed *in the State court* a petition to amend its answer in the suit brought against it by the Chandler-Dunbar Water Power Company (record, 635 to 657), in which the applicability of Porterfield scrip to said lands was expressly denied.

Record, 636, 639, 642, 644, 654.

The effect, therefore, of the employment of Mr. Fox by the Michigan-Lake Superior Power Company was to cause that company to waive all claim which it or its attorney had ever asserted against the United States to Islands 1 and 2 or to the opposite shore land. And the employment of Mr. Fox by the United States, so far from being an injury to the government, is shown to have been, at least to that extent, advantageous.

Immediately upon the return of Mr. Fox to Washington, after the argument of the case in the Circuit Court, he addressed a communication to the Attorney General on July 7, 1905, in which he called attention to the statements made at the argument (which are found at pages 57 to 65 of the record herein) and said:

"The matter referred to concerns my relations to this case and to your Department and involves criticism of such relations by counsel for the defendant. I beg therefore to say that, if my connection with this case is in the least degree embarrassing to your Department, I ask to be relieved from further duty in the matter."

Appendix to this brief, xxxiv.

On the following day, July 8, 1905, the Acting Attorney General wrote to Mr. Fox, repelling the suggestions made by the Chandler-Dunbar Company and saying:

"I beg to add that your connection with the case is in no way embarrassing to the Department, and that we have no intention or desire to relieve you from further duty in the matter."

Appendix to this brief, xxxv.

Thereupon, on August 2, 1905, the commission of Mr. Fox was recalled by the Department and a new commission was issued to him in which his compensation, instead of being nominal, was to be determined by the Attorney General at the completion of his service.

Appendix to this brief, xxxvi.

When the case came to this court the commission of Mr. Fox as Special Assistant to the United States Attorney for the Western District of Michigan was recalled, on February 4, 1908, and a new commission was issued to him as "Special Assistant to the Attorney General," in which his compensation continued to be the same as in the commission of August 2, 1905.

Appendix to this brief, xxxvi.

It may not be improper here to state that, although said later commissions provided for the fixing of the compensation of said special counsel at the termination of his services, he has received, on account, $4,000, by various payments beginning in August, 1905.

The United States has also borne the entire expenses of this litigation from the beginning, including the travel expenses of special counsel and witnesses, witness fees, printing records and briefs, and miscellaneous expenses.

We beg to say, in concluding this uncalled for phase of the case, that it is extremely distasteful for the permanent officers of the Department of Justice, as well as for the special counsel for the United States, to give attention to so unreasonable a proposition. Indeed, in the brief filed in the Circuit Court, signed by the

United States attorney and by special counsel, the matter was entirely disposed of in one sentence, as follows:

"As to the defendants' allegation regarding the *object* of this suit being to assist a private corporation, and not to maintain the rights and duties of the United States, counsel for complainant prefer to submit no argument whatever."

Record, 57.

But it is evident that both in the Circuit Court and in the Circuit Court of Appeals an effect was produced by the persistent assertion of defendants' counsel that this cause is, in substance, a controversy between private interests in which the government has no substantial interest. That impression we desire now conclusively to remove.

## VII.

## STATUTE OF LIMITATION NOT APPLICABLE.

Paragraph XXVII of defendant's answer, as amended by stipulation (record, 36), invokes a statute of limitation, included in "An Act to repeal timber-culture laws and for other purposes," approved March 3, 1891, which provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act."

26 U. S. Stats., 1099.

No question of adverse possession can arise in this case, even if the fact were material, for to constitute adverse possession the possession must be hostile and

under claim of right, actual, open and notorious, exclusive, and continuous. But in this case these elements are lacking, by the admission of the defendant appellee itself.

See letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated September 4, 1902, (record, 191 to 195) in which the Commissioner quotes from a letter addressed by the Chandler-Dunbar Water Power Company, dated July 10, 1902, to Major W. H. Bixby, Corps of Engineers, United States Army, relative to Islands Nos. 1 and 2, as follows:

"*This company has so far refrained from the complete occupation of the islands,* but we are of the opinion that we are justified in entering upon the complete occupation thereof, and have been advised that we may do so."

Record, 192.

See also letter, introduced as Complainant's Exhibit No. 40, from the Chandler-Dunbar Water Power Company "By Wm. Chandler, President," dated December 10, 1902, addressed to Joseph Ripley, General Superintendent of the St. Mary's Falls Canal, to the same effect.

Record, 280, 281.

Coming now to the consideration of the United States statute of limitation, above set out, which says nothing about possession, we call attention at the outset to the fact that this is not a "suit by the United States to vacate and annul any patent heretofore issued." On the contrary, the existence of the Chandler

patent is recognized and its validity is unquestioned unless, for reasons hereinbefore advanced, said patent is void for lack of authority in the officers of the Land Department who issued it.

The Court of Appeals, in passing upon this case, made the mistake of assuming that the defendant had maintained adverse possession of Islands 1 and 2, which are the sole subject of this suit.

Record, 819.

The Court of Appeals also says of the act that:

"When it speaks of vacating or annulling patents, of course it means the grants of title which the patents purport to make, and which the United States had lawful right to make."

Record, 820.

In this, as shown by No. 37 of the appellant's assignment of errors (record, 838), that court erred in confusing the power of the United States with the power of the *officers* of the United States. We make no question that the *United States, i. e.,* the Congress and the President, acting conjointly by an act of Congress, could grant land which had been or is now embraced in the military reservation or the reservation for public uses at Sault Ste. Marie. Indeed, the United States, so proceeding by an act of Congress, approved by the President, did, on July 8, 1886, release from reservation and provide for the disposal of the strictly military reserve, viz., the lands reserved for the Post of Fort Brady.

24 U. S. Stats. 128.

But no mere officer of the United States, no Commissioner of the General Land Office, no Secretary of the Interior, nor even any person holding the exalted position of President, had or has any power vested in himself to convey, release or otherwise dispose of any lands which were embraced in the final designation and reservation for public uses on August 5, 1852, by the Secretary of War, acting under the authority and express direction of the Congress and the President, expressed in the act of September 26, 1850.

The proposition is, after all, a simple one. If John Doe owns, in the city of Washington, the fee simple of a tract of land upon which his dwelling is built, and also owns the fee simple of other land in said city, and if said Doe gives to Richard Roe a power of attorney to sell all his real estate in the city of Washington, **reserving and excepting,** however, the land occupied by Doe's dwelling, it is evident that Richard Roe may sell all of the real estate in said city belonging to John Doe, except Doe's dwelling, but that a deed given by Roe to anybody for the land so expressly reserved by the power of attorney under which he acts is inoperative and void. In this case John Doe is the United States and Richard Roe is the Land Department, which can dispose only of such portions of the real estate belonging to the United States as it holds a power of attorney from Congress to dispose of.

The Circuit Court of Appeals, misapprehending the above distinction, held that the statute of limitation of 1891 applies to this case, although admitting that:

"Doubtless this would not extend to lands reserved by treaty, and probably not to lands which had at the

date of the statute been taken out of its power of disposition in favor of other parties who had acquired contingent interests therein."

Record, 820.

It is difficult to see what distinction can be made between lands reserved by treaty and land reserved by the United States for its own great public uses. And even the Court of Appeals seems not to have been impressed by the strength of its own decision in this regard, for the opinion further says:

"But as *it is possible that we may be mistaken about this*, and the principal object of the suit would not be fully accomplished by its disposition upon this ground, we shall consider the merits of the case without regard to the statute of limitations."

Record, 821.

Statutes of limitations are of two kinds, negative and positive prescription. Positive prescription takes away the right of entry, *i. e.*, confirms a title in the holder. Negative prescription simply takes away the remedy, but does not confirm the title.

It will be observed that the act relied upon by the defendant does not confirm in the patentees the titles secured by patents from the United States, but merely provides that the United States shall not bring any suit to vacate or annul such patents after a given time, which has expired in this case.

Counsel for appellant beg again to call particular attention to the fact that this is not a suit to vacate or annul the patent issued to Chandler in 1883, but is a suit to quiet title to certain islands claimed by defendant

to have passed as a riparian incident to the title carried by said patent. In endeavoring to maintain its title to said islands, the complainant asserts that the Chandler patent is void, and that, therefore, riparian incidents dependent thereon can not exist. The Chandler patent is not merely voidable but absolutely void, and carries no title. If that be true, no statute of limitations can apply, because in legal effect no such patent ever existed. Statutes of limitations may protect a *voidable* title from any question as to its validity, but no statute of limitations can operate upon a thing that never existed.

The act of 1891, upon which the defendant relies, has been considered by this court in United States *vs.* Winona and St. Peter Railroad Company (165 U. S., 463). In that case the court upheld the titles under the patents, but it does not appear that the lands when patented were in a state of reservation, as in this case. And the court was very careful to limit the scope of its decision to public lands which were *subject to disposal*, as will appear by the following quotation:

"Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, *providing only that the land was public land of the United States and open to sale and conveyance through the Land Department.*"

165 U. S., 476.

In Powell's Lessee *vs.* Harman the defendant proved that he had been *in peaceable possession* for the statutory period under a statute of limitations of Tennessee,

He claimed under a tax sale which was admitted to be void, because the requisites of the law in regard to the sale of lands for taxes had not been complied with. The case came to this court on a certificate of division from the Circuit Court, and the opinion was written by Mr. Chief Justice Marshall. The court held, in 1829:

"The conveyance being made by a person having no authority to make it, is of no validity, and can not connect the purchaser with the original grant."
2 Peters, 242.

It is true that the above decision was, three years later, overruled in Green *vs.* Neal's Lessee (6 Peters, 291). But this was only because both cases arose under a statute of limitation of the State of Tennessee and, in the earlier decision, the attention of the court was not called to a decision of the Supreme Court of that State rendered in 1825, which definitely settled questions which up to that time had been involved in doubt. The reason given by the opinion in Green *vs.* Neal is as follows:

"As it appears to this court that the construction of the statutes of limitations *is now well settled*, differently from what was supposed to be the rule at the time this court decided the case of Patton's Lessee *v.* Easton, and the case of Powell's Lessee *v.* Green; and as the instructions of the Circuit Court were governed by these decisions, and not by the settled law of the State, the judgment must be reserved, and the cause remanded for further proceedings."
6 Peters, 301.

In the above this court was only following its established practice in giving effect to local law as construed by the highest court of the State in which the controversy arises.

But, on referring to the decisions mentioned, it will be observed that they involve an adverse possession of seven years which, under the statute of Tennessee, as finally settled, became effective to establish title. In the present case there has been, as shown by the admission of the appellee quoted above, no adverse possession of said Islands 1 and 2 for any statutory period, either under the laws of Michigan or under any law of the United States.

When Mr. Chief Justice Marshall delivered the opinion in Powell's Lessee *vs.* Harman, he was giving voice to a legal principle which is, *as general law*, as good today as when it was uttered. The fact that this court felt constrained in the later case to apply to the Tennessee statute the construction of the Tennessee courts does not impair the value of such exposition of the general law. The statute of limitation here under consideration is not a law of the State of Michigan but a law of the United States and the general rule so stated by this court is as conclusive today as it was in 1829.

Even if possession had been an element of the statute of 1891 (which it is not), and even if the Chandler-Dunbar Water Power Company had held adverse possession of Islands 1 and 2 for five years after the date of the Chandler patent issued in 1883 by the United States (which it did not), the case is one arising under general law, as to which the decisions of the courts of the United States are controlling and not those of a State.

This suit involves directly only the title to Islands 1 and 2, as to which the appellant seeks to quiet its title. Incidental questions (and vital questions) arise as to the appellee's ownership of the shore, and doubtless the decision of this court, in this case, as to such shore title will be acquiesced in by all parties concerned, without further litigation. But that does not justify the application of the statute of limitation of 1891 to the islands which are the subject of this suit, and the title to which may be declared to be in the United States, because of the public character of the waters surrounding them, even if, which we do not anticipate, the shore title should be held to be good in the appellee.

## VIII.

## ESTOPPEL.

The issue of patent to Chandler was an unauthorized act of the officers of the United States. The officers who issued it had no power to convey title to public lands which were reserved from disposal under the public land system. However sincere the officers who issued the patent may have been in their belief that they were acting according to law, their opinion and action do not bind the United States. This rule is observed even though the unauthorized acts may have been beneficial to the Government, which is very far from being the situation in the case at bar.

"Their unauthorized acts cannot estop the Government from insisting upon their invalidity, however beneficial they may have proved to the United States."

Filor *vs.* United States, 9 Wall., 45, per Mr. Justice Field.

United States *vs.* City of Alexandria, 19 Fed. Rep., 609.

The defendant introduced in evidence a letter dated May 19, 1883, sent by William Chandler to Major Farquhar, Corps of Engineers, Detroit, (record, 559) in which, referring to the land in question which had then been located by him with Porterfield scrip, but had not yet been patented, he offered to deed to the United States his title to the same for a compensation to be fixed by arbitrators. At that time the Secretary of the Interior had rejected Chandler's location, in the previous January, deciding that the land was not subject to such location.

Record, 173.

The letter speaks of a *verbal* proposition which Chandler had previously made to General Weitzel, Major Farquhar's predecessor in that engineering district. It will be remembered that General Weitzel was at that time, and had been, vigorously protesting against the location of said scrip and had been endeavoring to preserve the tract for the uses of the United States. In view of the Secretary's existing decision at the time of Chandler's said letter, it may be easily understood that General Weitzel did not care to negotiate for land to which Chandler's title had not been established.

Furthermore, it does not appear that said letter of Chandler was ever brought home to the responsible authorities of the United States by reference either to the Chief of Engineers, who has charge of such matters, or to the Secretary of War, whose predecessor had reserved the land included in the Chandler location, or to the President, or to Congress. The act of 1850,

under which the Secretary of War had made the final definite reservation of August 5, 1852, had never been repealed and there was no authority then existing in any officer of the United States to modify that designation and reservation.

It is evident that if estoppel is to arise against the United States, under such circumstances, the government may lose all the real and movable property that it owns without the knowledge of those Departments and officers of the Government to whose custody and protection it is committed.

## IX.

## LACHES.

"It is well settled that when the Government has a direct pecuniary interest in the subject-matter of the litigation the defenses of stale claim and laches cannot be set up as a bar."

San Pedro and Cañon del Agua Company *vs.* United States, 146 U. S., 120.

United States *vs.* Dalles Military Road Company, 140 U. S., 599.

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# APPENDIX.

## APPENDIX A.

**Extracts from the Report of the Commissioners under the Treaty of Ghent, dated December 12 and December 24, 1827, as printed in House of Representatives Executive Document No. 451, 25th Congress, 2d Session.**

(NOTE.—The figures in bold type refer to pages of the document.)

From the Report of the American Commissioner.

**[3]** "The joint commissioners of the United States of America, and of his Britannic Majesty, appointed under the sixth and seventh articles of the treaty of Ghent to ascertain and fix a certain portion of the boundary line between the dominions of the two contracting parties lying in North America, and to decide upon the property of the several islands situated in the lakes, rivers and water communications, through which the said boundary passes, in conformity with the true intent of the treaty of 1783—having differed in regard to certain portions of the boundary embraced by the 7th article of the said treaty of Ghent; and having also disagreed as to the appropriation of a certain island lying in the water communication between lakes Huron and Superior, the undersigned commissioner on the part of the United States now proceeds, in compliance with one of the requisitions of the last-mentioned treaty, in case of such disagreement, to detail, in a separate report, the points in difference between him and his colleague, and the grounds of the opinions which he entertains in regard to the subject-matter of such difference."

**[4]** "The two points in difference between the commissioners are—

"1st. As to the course which the boundary line should pursue in passing the island called 'St. George's,' or 'Sugar island,' situated in the water communication between lakes Huron and Superior, and involving also the property of said island: the American commissioner being of opinion that the boundary should be drawn along the channel which divides the island from the British or eastern shore, and thus place it within the territories of the United States; and the British commissioner contending, on the other hand, that the line should pass through the American or western channel, and the island be appropriated to his Britannic Majesty."

**[4]** "By the treaty of 1783, the boundary from St. Regis (the point where the 45th parallel of latitude first strikes the St. Lawrence) to lake Superior, is simply and uniformly described as passing 'through' or 'along the middle,' of the several rivers, lakes, and water communications which separate the countries. Although any line which would have the **[5]** effect to divide this sheet or volume of water into two equal quantities, whether superficial or cubic, would be equally a 'middle' line, yet the first and most ready interpretation of the phraseology here used by the parties, would seem to point to a line run longitudinally through this water communication, in such a direction as to be always midway or equidistant from the two opposite shores. Were this chain of water communication straight and of uniform size, or its shores but moderately curved and irregular, and, at the same time, were it free from islands, this equidistant line might conveniently be, and probably would have been, adopted as the boundary. But a moment's inspection of the maps accompanying this report will exhibit such irregularities in the size, shape, and direction of this body of water, as to render the application of this principle inconvenient and ridiculous, if not utterly impracticable. This water communication, although composed of one continuous sheet, assumes in its progress an endless diversity of shapes and courses—sometimes expanding into lakes and bays, several hundred miles in breadth, and at others contracted and contorted into a narrow and crooked river or strait, pursuing by turns every point of the compass, and presenting numerous cases where, from the peculiar conformation of the opposite shores, an equidistant line seems to be wholly impracticable. One of these cases (and it often

occurs) is where the curvature or indentation of a shore is so deep and sudden as to form (when represented by straight lines) an angle of less than ninety degrees; another, where the river divides into two channels, which part, and take opposite directions; or where one or both of these channels take a direction retrograde from the general course of the river; or where there is but one channel, and the opposite sides assume all these varying and contradictory courses."

**[7]** "Having mutually recognized the principle that the boundary should invariably be a water line from St. Regis to lake Superior, there were other considerations involved in the discharge of our official duties, which seemed to demand an early attention, and to present equally proper subjects for the establishment of some general rules or principles; and one of the most important of these regarded the subject of navigation.

"The vast chain of water communication extending from the Atlantic for two thousand miles, into the interior of North America, and so large a proportion of which forms the natural boundary between the two par- **[8]** ties, navigable for ships in its whole extent, with the exception of two or three short interruptions, which will probably soon be removed by the construction of artificial canals. *To this water communication, and the free use of its navigation, the immense territorial possessions lying on each side of it, and belonging to the respective parties, are indebted for more than half of their value.* It became, therefore, the obvious duty of the two commissioners to inquire in what manner, if at all, and to what extent, their operations might affect the rights of the respective parties to this navigation. If the effect of establishing the boundary would be to limit and restrict the rights of navigation, as well as those of territory, it would seem to be incumbent on the commissioners to give such a direction to the line as would secure, as far as practicable, a continuous navigation to each party.

"The first time that this question of navigation was agitated between the undersigned and his *present* colleague, was at the meeting of the board in New York, late in the autumn of 1821, after our surveys and maps under the 6th article of the treaty had been completed, but before any decisions had been made in regard to the course of the boundary. It was known to us that some difference of opinion existed even among able jurists, as to the precise relations which ought in

particular cases to obtain between territorial rights and the rights of navigation, and how far the one should control or modify the other; and, although it may be said that the question of navigation was not by the treaty submitted to the adjudication of the commissioners, yet so intimate were its connections with, and so important its bearing upon, the great interests which *were* thus submitted, that it could not be disregarded.

"At that meeting a proposition was submitted to and entertained by the board, the import of which was, that the two commissioners, in making their final award and description of the boundary agreed on by them, should accompany it by, or rather incorporate into it, a joint declaration that they had assumed as one of the bases of their operations the principle that the navigation of all the lakes, rivers, and water communications through which, by the treaty of 1783, the boundary is to pass, *should continue, as before, open and free to the citizens and subjects of the two Powers, unaffected by the course of the territorial or boundary line to be established by their award;* it being, however, understood that the proposition should be first submitted to, and receive the assent of, their respective Governments.

"It is obvious that, had we been successful in the adoption of this principle, it would have greatly facilitated our labors, and enabled us to make a more satisfactory distribution of the insular territory, by removing the embarrassment which the question of navigation was constantly interposing. It was, moreover, believed that a distinct declaration in regard to the reciprocal rights of navigation, sanctioned by the two parties, would be highly useful and important in the prevention of future collisions and misunderstandings.

"The proposition was accordingly submitted by the commissioners to the ministers of their respective Governments, then at the city of Washington; and, although it was readily acceded to by the President of the United States, the undersigned was given by his colleague to understand that the British minister had declined, on the part of his Government, to give it his sanction."

**[11]** "5th. That much the largest portion of the whole insular territory lying in the river, strait, or water communication between lakes Huron and Superior, is comprised in three large islands, namely: isle St. Joseph, containing 141.9 square miles, or ninety thousand eight hundred and

sixteen acres; isle St. Tammany, containing 15.8 square miles, or ten thousand one hundred and sixty-four acres; and isle St. George, containing 40.5 square miles, or twenty-five thousand nine hundred and twenty acres; that isle St. Joseph, containing ninety thousand eight hundred and sixteen acres, has already been allotted to Great Britain by the commissioners while acting under the sixth article of the treaty; that isle St. Tammany, containing ten thousand one hundred and sixty-four acres, has, by the adjudication of the same commissioners, acting under the seventh article of the treaty, been assigned to the United States; and that the isle St. George alone (which is the subject of disagreement) yet remains to be appropriated. (See all the maps of the straits of St. Mary's, with the boundary traced on them, and Mr. Ferguson's estimate of the contents of the island.)"

**[14]** "The river St. Lawrence differs from most other parts of the water communication between the two countries. From lake Ontario to Prescott and Ogdensburg, it is broad, deep, and navigable for ships of any size; from the head of Baxter's island to the lower end of Barnhart's, a distance of about nine miles, commonly called the *Long Saut,* it is so rapid and precipitous that no ship or other vessel adapted to lake navigation has ever ventured to enter it. It is, however, navigated by small boats or batteaux, but can be ascended only by the use of tow-ropes managed from the shores; and each of the main shores is about equally fitted for this kind of navigation. Boats and rafts of timber may, moreover, descend it, but with some hazard, through the middle of the American channel—that is to say, between Baxter's island, the middle of Saut island, and Barnhardt's island (commonly called the Three Saut islands) on the one side, and the American main land on the other; but no boat or raft can descend through the middle of the British channel, without the most imminent hazard of destruction. In tracing the boundary, there- **[15]** fore, through this frightful cataract, we felt ourselves absolved from the restraints which the question of navigation had, for reasons before stated, imposed on us in regard to other parts of the line."

**[19]** "There is an evident mistake or omission in the treaty of 1783, and continued in the treaty of 1814, in regard to the boundary through the water communication between lakes Huron and Superior. In its approach to this strait, the boundary is described in both treaties as 'passing

through lake Huron *to* the water communication between that lake and lake Superior; thence (leaping over this water communication, and treating it as a mathematical point) through lake Superior,' &c.

"In discharging their official duties, the two commissioners have treated this omission as a pure mistake or inadvertence, and have given the same interpretation to the treaty as they would have done had the line been continued on 'THROUGH' this water communication, by the use of the same phraseology that is uniformly applied to every other water communication; that is to say, 'through its middle.'

"But if the commissioners were right (and it will hardly be contended that they were not) in assuming this latitude of interpretation, they had the further right to select the place, within this space or interval, where the lines of the two articles of the treaty should be divided; and they might, with equal propriety, have fixed it at either end, as at any intermediate point in this space. Indeed, *the most obvious place for this division was at the Sault Ste. Marie, where the river is single and narrow*, and the bisecting line would be short and determinate; and that point would probably have been selected, but that the season closed upon the surveyors when they were some twenty miles short of it. Had this or the opposite end of the strait been taken, the whole of the three large islands before mentioned would have fallen under the same article; and then, St. Joseph's island having first been appropriated to Great Britain, the same argument which is now used in claiming St. George's island for his Britannic Majesty, would have applied, and with augmented force, in demanding it for the United States. The undersigned would further add, that although the surveys of St. Tammany's and St. George's islands were not completed at the time of closing the 6th article, and allotting St. Joseph's island to Great Britain, still he was possessed of very correct general information as to their locations and extent. He therefore could not for a moment permit himself to doubt but that, at the proper time, and for the numerous reasons set forth in this report, they would both be assigned to the United States by the unhesitating award of the two commissioners."

From the Report of the British Commissioner.

**[43]** "SEC. 15. *Thereupon, resolved,* That the commissioners disagree as to the course which the boundary line should pursue from the termination thereof, under the 6th article of the treaty of Ghent, at a point in the Neebish channel, near Muddy lake, to another point in the middle of St. Mary's river, about one mile above St. George's or Sugar island: the British commissioner being of opinion that the line should be conducted from the before-mentioned terminating point of the boundary line under the 6th article, being at the entrance from Muddy lake into the ship channel, between St. Joseph's island and St. Tammany's island, to the division of the channel at or near the head of St. Joseph's island; thence, between St. George's island and St. Tammany's island, turning west- **[44]** wardly through the middle of the middle Neebish, proceeding up to and through the Sugar rapids, between the American main shore and the said St. George's island, so as to appropriate the said island to his Britannic Majesty: and the American commissioner being of opinion that the line should be conducted from the before-mentioned terminating point of the boundary under the 6th article, into and along the ship channel between St. Joseph's and St. Tammany's islands, to the division of the channel at or near the head of St. Joseph's island; (concurring thus far with the British commissioner;) thence, turning eastwardly and northwardly around the lower end of St. George's or Sugar island, and following the middle of the channel which divides St. George's island, first from St. Joseph's island, and afterwards from the main British shore, to the before-mentioned point in the middle of St. Mary's river, about one mile above St. George's or Sugar island, so as to appropriate the said island to the United States.

"SEC. 16. *Resolved,* That in the opinion of the commissioners, the following described line, which is more clearly indicated by a series of maps prepared by the surveyors, and now on the files of this board, by a line of black ink, shaded on the British side with red, and on the American side with blue, is, so far as the same extends, the true boundary intended by the treaties of 1783 and 1814; that is to say, beginning at a point in the middle of St. Mary's river, about one mile above the head of St. George's or Sugar island, and

running thence, westwardly, through the middle of said river, passing between the groups of islands and rocks which lie on the north side, and those which lie on the south side the Sault de Ste. Marie, as exhibited on the maps; thence, through the middle of said river, between points Iroquois and Gros Cap, which are situated on the opposite main shores, at the head of the river St. Mary's and at the entrance into lake Superior; thence, in a straight line through lake Superior, passing a little to the south of isle Caribocuf, to a point in said lake, one hundred yards to the north and east of a small island named on the map Chapeau, and lying opposite and near to the northeastern point of isle Royale."

**[49]** "SEC. 22. The British commissioner, on the other hand, still maintaining the claim of Great Britain to St. George's island, and to the establishment of the boundary line through the Middle Neebish and the Sugar rapids, as before set forth, stated to his colleague the necessity of his adherence to the same, as he considered that the application of the same principles which, under the 6th article of the treaty of Ghent, appropriated Barnhart's island, in the St. Lawrence, and the islands at the head of lake St. Clair, lying between the boundary line as there settled and the American main shore, to the United States, would in this instance require St. George's island to be allotted to Great Britain. Mr. Barclay, however, impressed with the propriety, not only of dividing the doubtful territory between the two Governments, but also of preserving the navigation free to both nations, proposed to stipulate with the American commissioner, upon condition of his agreeing to fix the boundary in the Middle Neebish and Sugar rapids, and to allot St. George's island to Great Britain, that the channel through the East Neebish and lake George should remain free for the fair and lawful commerce of both nations; provided the commissioner of the United States would guaranty the like with respect to the channel running on the southeast side of Barnhart's island, and to that channel through the islands of lake St. Clair, which is contiguous to the American main land, and which is commonly used because it is the easiest and safest."

**[54]** "SEC. 27. 1st. Upon the first point, namely, the difference in relation to the Neebish channels and rapids, the undersigned (referring to the maps of the surveys executed

under this commission, as certified by the surveyors, and signed by the commissioners) observes, that in this section of the water communication, (namely, the Neebish channels,) through which the boundary line must pass, in conformity to the treaties of 1783 and of 1814, there are two principal islands. The northern one is generally known as isle of St. George, and is so described on the maps. The southern one has been designated by the commissioners as St. Tammany's island, in compliment to the United States, to whose portion this island was without controversy to be allotted. The three channels formed by these islands and by the adjacent main shores are designated as the Eastern Neebish, the Middle Neebish, and the Western Neebish.

"SEC. 28. These channels have all of them their rapids. The Western Neebish channel is so shallow as to be suited only to the navigation of canoes and small boats. The Middle Neebish is of good depth, except at some particular points, where, by means of shoals or of rocks, the navigation is rendered unfit for the larger trading vessels of the lakes: it is sufficient, however, for large and deep boats, and is more used than either of the other channels. The Eastern Neebish alone is adapted for the navigation of the larger classes of trading vessels employed in these regions, between lake Huron and the Sault de Ste. Marie, which last-named place is about three miles above (that is, to the north of) the head and junction of these several channels, and is distant about fourteen miles from lake Superior. At this point the Sault de Ste. Marie causes an interruption of the navigation, and a discharge of the cargoes of vessels is required, when designed for the countries lying farther westward, for the purpose of transporting them, either over land or by boats through a canal, to a part of the river St. Mary just above the said Sault, where they may be reshipped for lake Superior."

**[61]** "SEC. 49. It may here be objected, in behalf of the United States, that the cession of St. George's island to Great Britain would leave the ship channel entirely within the British territory. True; but *the cession of half the islands at the head of lake St. Clair, and of the upper Long Sault, the lower Long Sault, and Barnhart's islands, placed the channels along them, respectively, entirely within the United States territory.* To avoid this objection on the part of the commissioner of the United States, the undersigned

made to him the following proposition, viz: That, upon his assenting to establish the line through the Middle Neebish and the Sugar rapids, and to allot St. George's island to Great Britain, in conformity with the principles set forth by the undersigned, as uniformly acted upon by these commissioners, the undersigned would stipulate that the Eastern Neebish should remain free for the fair and lawful commerce of both nations, provided the same stipulation should be simultaneously made on his part in respect to the channel south of Barnhart's island, and of the two Long Sault islands, and to the channel (contiguous to the American main shore) which connects the river St. Clair with lake St. Clair.

"SEC. 50. The undersigned proceeded to make the above specified proposition with the less hesitation, and the less doubt of its being favorably received, because formerly the American commissioner, in his conferences for the adjustment of the boundary under the 6th article, voluntarily proposed to the undersigned to declare, in writing, that the existing appropriations of the islands in the Long Sault were made upon the ground and understanding that the several channels were common to the use of both nations. *This suggestion was at that time declined by the undersigned, for the reason that, as those channels were considered to be already free to the use of both Governments, by the law of nations, it was superfluous that the commissioners should declare them to be so.* A settlement of this point has since become desirable, in consequence of the apprehension of collision from the differing interests and various sentiments of the people of the two Governments; some of the inhabitants of the State of New York, especially, having petitioned the Government at Washington to impose transit duties upon all British property passing Barnhart's island. This proposition made by the undersigned was not accepted by the commissioner of the United States.

"SEC. 51. Such being the case, the undersigned alleges that, instead of its forming an objection to the allotting of St. George's island to Great Britain, thereby the main channel would be thrown entirely within the British territory, and constitutes the strongest ground why it should be so appropriated, under the parallel state of this case with that of Barnhart's island and the Long Sault channel, in order that such interruption of the British navigation, on the part of the United States, as has been already sought for and

threatened by some of the citizens thereof, may be held in check by putting in possession of the British Government an opportunity to retaliate. There is no other mode of equalizing and securing the rights assigned to both parties under this commission, and there is no other method of making compensation to Great Britain for the frank exercises of a principle towards her rival, which she expected that good faith would as cheerfully exercise towards her in turn."

**[70]** "SEC. 75. From a point in the river St. Mary's just above St. George's island, to a point near the east end of isle Royale, in lake Superior, the commissioners having agreed upon the boundary line, and having described the same in their journal, and marked it accordingly on their maps by them certified and subscribed, (as set forth in their joint statement, which is recited in the 16th section of this report,) the undersigned proceeds to the consideration of the next difference," * * *

**[95]** "SEC. 188. The principal memorial of the American agent in support of **[96]** his claims was filed at the board on the 5th October, 1826. It sets out with observing, (page 1, of copy containing 42 pages:)

"It is remarkable that the definitive treaty of 1783 does not describe the boundary lines passing through the middle of the St. Mary's river; that part of the treaty which relates to it reads: thence, along the middle of the said water communication, (meaning the Detroit and St. Clair rivers and lake,) into lake Huron; thence, through the middle of the said lake, to the water communication between that lake and lake Superior; thence, through lake Superior," &c. He proceeds: "In lake Superior, the rights of the United States are expressly enlarged by the line being carried far to the northward of a middle line; and the suggestion is submitted, whether by this omission it was not intended that the water communication between lakes Huron and Superior should be considered as part of lake Superior, and that the islands in this river, like those in lake Superior, should chiefly belong to the United States."

"SEC. 189. This ingenious effort at argument savors too much of burlesque to merit serious reply. It must be refuted, however, lest by the friends of such ingenuity it be taken *'pro confesso.'* The answer is brief, although threefold; the first part drawn from the terms above quoted, by

the American agent, from the treaty of 1783. That treaty expressly mentions a water communication between lakes Huron and Superior, as distinct from either of those lakes; and before an attempt was made to confound two subjects which a treaty had distinguished by marked discrimination, (those two subjects, also not impalpable, metaphysical, or immaterial, but forming large and substantial features of the globe we inhabit,) there should have been shown us some new rule of interpretation.

"SEC. 190. The second part of the answer is derived from the geography of the region in question. At the Sault de St. Marie the water communication becomes very contracted, the river itself very shallow, the current violent, and nature herself has, by the sault or falls, separated the waters above from those below. Had it been convenient for the American interest to argue that the waters below the Sault de St. Marie, in which the disputed island of St. George is situated, actually constitute a part of lake Huron, the claim could be argued with much better grace; *for the river expands as soon as it reaches the island, it continues very very broad until it arrives at the open waters of lake Huron, and it would undoubtedly form a part, and a large part, of that lake, if the islands (which separate its channels) were removed.* From this place (the Sault) to the Gros Cap, where the waters expand into the great lake Superior, being a distance of 14 miles, the river continues contracted, with the exception of one bay, so that it has no pretensions to be considered a part of the lake; and there is no island in the whole distance, at least none worthy of notice, or at all questionable."

**[99]** "That, in general, the Middle Neebish channel and Sugar rapids have good depth of water, sufficient for the heaviest loaded batteaux and canoes; and this Middle Neebish channel and Sugar rapids are always preferred, by such craft, to the other two channels; that the passage by this Middle Neebish channel is shorter by ten and a half statute miles than that of the East Neebish channel, and less exposed in gales of wind."

# APPENDIX B.

## Diplomatic Correspondence Preceding the Treaty of 1842.

*Lord Ashburton to Mr. Webster.*

"WASHINGTON, *July* 16, 1842.

"SIR: There is a further question of disputed boundary between Great Britain and the United States, called the northwest boundary, about which we have had some conferences; and I now proceed to state the terms which I am ready to agree to for the settlement of this difference. As the principal object in dispute is to be given up by Great Britain, I trust, Sir, that you will here again recognize the spirit of friendly conciliation which has guided my government in disposing of these questions.

"I have already sufficiently discussed with you the boundaries between her Majesty's Provinces and the United States, from the monument at the head of the River St. Croix to the monument on the River St. Lawrence, near the village of St. Regis.

"The commissioners under the sixth article of the treaty of Ghent succeeded in continuing this boundary from St. Regis through the St. Lawrence and the great northern lakes, up to a point in the channel between Lake Huron and Lake Superior.

"A further continuation of this boundary, from this point through Lake Superior to the Lake of the Woods, was confided to the same commissioners under the seventh article of the treaty of Ghent, but they were, unfortunately, unable to agree, and have consequently left this portion of the boundary undetermined. Its final settlement has been much desired by both governments, and urgently pressed by communications from Mr. Secretary Forsyth to Mr. Fox, in 1839 and 1840.

"What I have now to propose cannot, I feel assured, be otherwise than satisfactory for this purpose.

"The commissioners who failed in their endeavors to make this settlement differed on two points:—

"First. As to the appropriation of an island called St. George's Island, lying in the water communication between Lake Huron and Lake Superior; and,

"Secondly, As to the boundary through the water communications from Lake Superior to the Lake of the Woods.

"The first point I am ready to give up to you, and you are no doubt aware that it is the only object of any real value in this controversy. The island of St. George is reported to contain twenty-five thousand nine hundred and twenty acres of very fertile land; but, the other things connected with these boundaries being satisfactorily arranged, a line shall be drawn so as to throw this island within the limits of the United States.

"In considering the second point, it really appears of little importance to either party how the line be determined through the wild country between Lake Superior and the Lake of the Woods, but it is important that some line should be fixed and known.

"The American commissioner asked for the line from Lake Superior up the River Kamanastiguia to the lake called Dog Lake, which he supposed to be the same as that called Long Lake in the treaties, thence through Sturgeon Lake to the Lac la Pluie, to that point where the two lines assumed by the commissioners again meet.

"The British commissioner, on the other hand, contended for a line from the southwestern extremity, at a point called Le Fond du Lac, to the middle of the mouth of the estuary, or lake, of St. Louis River, thence up that river through Vermilion River to Lac la Pluie.

"Attempts were made to compromise these differences, but they failed, apparently more from neither party being willing to give up the island of St. George, than from much importance being attached to any other part of the case.

"Upon the line from Lake Superior to the Lake of the Woods, both commissioners agreed to abandon their respective claims, and to adopt a middle course, for which the American commissioner admitted that there was some ground of preference. This was from Pigeon River, a point between Kamanastiguia and Le Fond du Lac; and although there were differences as to the precise point near the mouth of Pigeon River where the line should begin, neither party seemed to have attached much importance to this part of the subject.

"I would propose that the line be taken from a point about six miles south of Pigeon River, where the Grand Portage commences on the lake, and continued along the line of said portage, alternately by land and water, to Lac la Pluie, *the existing route by land and by water remaining common to both parties.* This line has the advantage of being known, and attended with no doubt or uncertainty in running it.

"In making the important concession on this boundary of the island of St. George, I must attach a condition to it of accommodation, *which experience has proved to be necessary in the navigation of the great waters which bound the two countries; an accommodation which can, I apprehend, be no possible inconvenience to either. This was asked by the British commissioner in the course of the attempts of compromise above alluded to; but nothing was done, because he was not then prepared, as I am now, to yield the property and sovereignty of St. George's Island.*

"The first of these two cases is at the head of Lake St. Clair, where the river of that name empties into it from Lake Huron. It is represented that the channel bordering the United States coast in this part is not only the best for navigation, but, with some winds, is the only serviceable passage. I do not know that, under such circumstances, the passage of a British vessel would be refused; but, on a final settlement of boundaries, it is desirable to stipulate for what the commissioners would probably have settled, had the facts been known to them.

"The other case, of nearly the same description, occurs on the St. Lawrence, some miles above the boundary at St. Regis. In distributing the islands of the river by the commissioners, Barnhart's Island and the Long Sault Islands were assigned to America. This part of the river has very formidable rapids, and the only safe passage is on the southern or American side, between those islands and the mainland. We want a clause in our present treaty to say that, for a short distance, namely, from the upper end of Upper Long Sault Island to the lower end of Barnhart's Island, the several channels of the river shall be used in common by the boatmen of the two countries.

"I am not aware that these very reasonable demands are likely to meet with any objection, especially where the United States will have surrendered to them all that is essential in the boundary I have now to propose to you.

"I beg you will be assured, Sir, of my unfeigned and distinguished consideration.

"ASHBURTON.

"Hon. Daniel Webster, &c., &c., &c."

*Mr. Webster to Lord Ashburton.*

"DEPARTMENT OF STATE,
"WASHINGTON, *July* 27, 1842.

"MY LORD: I have now to propose to your Lordship a line of division embracing the disputed portions of the boundary between the United States and the British Provinces of New Brunswick and the Canadas, with its considerations and equivalents, such as conforms, I believe, in substance, to the result of the many conferences and discussions which have taken place between us.

"The acknowledged territories of the United States and England join upon each other from the Atlantic Ocean to the eastern foot of the Rocky Mountains a distance of more than three thousand miles. From the ocean to the source of the St. Croix the line of division has been ascertained and fixed by agreement; from the source of the St. Croix to a point near St. Regis, on the River St. Lawrence, it may be considered as unsettled or controverted; from this last-mentioned point, along the St. Lawrence and through the lakes, it is settled, until it reaches the water communication between Lake Huron and Lake Superior. At this point the commissioners, under the seventh article of the treaty of Ghent, found a subject of disagreement which they could not overcome, in deciding up which branch or channel the line should proceed, till it should reach a point in the middle of St. Mary's River, about one mile above St. George's or Sugar Island.

"From the middle of the water communication between the two lakes, at the point last mentioned, the commissioners extended the line through the remaining part of that water communication, and across Lake Superior, to a point north of Ile Royale; but they could not agree in what direction the line should run from this last-mentioned point, nor where it should leave Lake Superior, nor how it should be extended to the Rainy Lake, or Lac la Pluie. From this last-mentioned lake they agreed on the line to the northwesternmost point of the Lake of the Woods, which they

found to be in latitude forty-nine degrees twenty-three minutes fifty-five seconds. The line extends, according to existing treaties, due south from this point to the forty-ninth parallel of north latitude, and by that parallel to the Rocky Mountains.

"Not being able to agree upon the whole line, the commissioners, under the seventh article, did not make any joint report to their respective governments. So far as they agreed on any part of the line, that part has been considered settled; but it may be well to give validity to these portions of the line by a treaty.

"To complete the boundary line, therefore, and to remove all doubts and disputes, it is necessary for the two governments to come to an agreement on three points:—

"1st. What shall be the line on the northeastern and northern limits of the United States, from the St. Croix to the St. Lawrence? This is by far the most important and difficult of the subjects, and involves the principal questions of equivalents and compensations.

"2d. What shall be the course of the boundary from the point where the commissioners, under the sixth article of the treaty of Ghent, terminated their labors, to wit, a point in the Neebish Channel, near Muddy Lake, in the water communication between Lake Huron and Lake Superior, to a point in the middle of St. Mary's River, one mile above Sugar Island? This question is important, as it involves the ownership of that island.

"3d. What shall be the line from the point north of Ile Royale, in Lake Superior, to which the commissioners of the two governments arrived by agreement, to the Rainy Lake? And also to confirm those parts of the line to which the said commissioners agreed.

"Besides agreeing upon the line of division through which these controverted portions of the boundary pass, you have suggested, also, as the proposed settlement proceeds upon the ground of compromise and equivalents, that boats belonging to her Majesty's subjects may pass the falls of the Long Sault, in the St. Lawrence, on either side of the Long Sault Islands, and that the passages between the islands lying at or near the junction of the River St. Clair with the lake of that name shall be severally free and open to the vessels of both countries. There appears no reasonable objection to what is requested in these particulars; and on the part of the United

States it is desirable that their vessels, in proceeding from Lake Erie into the Detroit River, should have the privilege of passing between Bois Blanc, an island belonging to England, and the Canadian shore, the deeper and better channel being on that side.

"The line, then, now proposed to be agreed to may be thus described:—

"Beginning at the monument at the source of the River St. Croix, as designated and agreed to by the commissioners under the fifth article of the treaty of 1794, between the governments of the United States and Great Britain; thence north, following the exploring line run and marked by the surveyors of the two governments in the years 1817 and 1818, under the fifth article of the treaty of Ghent, to its intersection with the River St. John, and to the middle of the channel thereof; thence up the middle of the main channel of the said River St. John to the mouth of the River St. Francis; thence up the middle of the channel of the said River St. Francis, and of the lakes through which it flows, to the outlet of the Lake Pohenagamook; thence southwesterly, in a straight line, to a point on the northwest branch of the River St. John, which point shall be ten miles distant from the main branch of the St. John, in a straight line, and in the nearest direction; but if the said point shall be found to be less than seven miles from the nearest point of the summit or crest of the highlands that divide those rivers which empty themselves into the River St. Lawrence from those which fall into the River St. John, then the said point shall be made to recede down the said river to a point seven miles, in a straight line, from the said summit or crest; thence, in a straight line, in a course about south eight degrees west, to the point where the parallel of latitude of forty-six degrees twenty-five minutes north intersects the southwest branch of the St. John; thence southerly, by the said branch, to the source thereof in the highlands at the Metjarmette Portage; thence down along the said highlands which divide the waters which empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean, to the head of Hall's Stream; thence down the middle of said stream, till the line thus run intersects the old line of boundary surveyed and marked by Valentine and Collins, previously to the year 1774, as the forty-fifth degree of north latitude, and which has been known and understood to be the line of actual divi-

sion between the States of New York and Vermont on one side, and the British Province of Canada on the other; and from said point of intersection, west, along the said dividing line, as heretofore known and understood, to the Iroquois or St. Lawrence River; and from the place where the joint commissioners terminated their labors under the sixth article of the treaty of Ghent, to wit, at a point in the Neebish Channel, near Muddy Lake, the line shall run into and along the ship-channel between St. Joseph's and St. Tammany Islands, to the division of the channel at or near the head of St. Joseph's island; thence, turning eastwardly and northwardly, around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's from St. Joseph's Island; thence up the east Neebish Channel nearest to St. George's Island, through the middle of Lake George; thence west of Jonas Island, into St. Mary's River, to a point in the middle of that river about one mile above St. George's or Sugar Island, so as to appropriate and assign the said island to the United States; thence, adopting the line traced on the maps by the commissioners, through the River St. Mary and Lake Superior, to a point north of Ile Royale, in said lake, one hundred yards to the north and east of Ile Chapeau, which last-mentioned island lies near the northeastern point of Ile Royale, where the line marked by the commissioners terminates; and from the last-mentioned point, southwesterly, through the middle of the sound, between Ile Royale and the northwestern mainland, to the mouth of Pigeon River, and up the said river to and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communication to Lake Saisaginaga, and through that lake; thence to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake, and Lake Namecan, and through the several smaller lakes, straits, or streams connecting the lakes here mentioned, to that point in Lac la Bluie, or Rainy Lake, at the Chaudiere Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods; thence along the said line, to the said most northwestern point, being in latitude forty-nine degrees twenty-three minutes fifty-five seconds north, and in longitude ninety-five degrees fourteen minutes thirty-eight seconds west from the observatory at Greenwich; thence, according to existing treaties, the line

extends due south to its intersection with the forty-ninth parallel of north latitude, and along that parallel to the Rocky Mountains. It being understood that all the water communications, and all the usual portages,* along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries.

"It is desirable to follow the description and the exact line of the original treaty as far as practicable. There is reason to think that 'Long Lake,' mentioned in the treaty of 1783, meant merely the estuary of the Pigeon River, as no lake called 'Long Lake,' or any other water strictly conforming to the idea of a lake, is found in that quarter. This opinion is strengthened by the fact, that the words of the treaty would seem to imply that the water intended as 'Long Lake' was immediately joining Lake Superior. In one respect, an exact compliance with the words of the treaty is not practicable. There is no continuous water communication between Lake Superior and the Lake of the Woods, as the Lake of the Woods is known to discharge its waters, through the Red River of the North, into Hudson's Bay. The dividing height or ridge between the eastern sources of the tributaries of the Lake of the Woods and the western sources of Pigeon River appears, by authentic maps, to be distant about forty miles from the mouth of Pigeon River, on the shore of Lake Superior.

"It is not improbable that, in the imperfection of knowledge which then existed of those remote countries, and perhaps misled by Mitchell's map, the negotiators of the treaty of 1783 supposed the Lake of the Woods to discharge its waters into Lake Superior. The broken and difficult nature of the water communication from Lake Superior to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway, where necessary, for the use of the subjects and citizens of both governments.

"When the proposed line shall be properly described in the treaty, the grant by England of the right to use the waters of the River St. John for the purpose of transporting to the

* NOTE.—The records of the State Department show no comma after the word "portages."

mouth of that river all the timber and agricultural products raised in Maine on the waters of the St. John or any of its tributaries, without subjection to any discriminating toll, duty, or disability, is to be inserted. Provision should also be made for quieting and confirming the titles of all persons having claims to lands on either side of the line, whether such titles be perfect or inchoate only, and to the same extent in which they would have been confirmed by the respective governments had no change taken place. What has been agreed to, also, in respect to the common use of *certain passages* in the rivers and lakes, as already stated, must be made matter of regular stipulation.

"Your Lordship is also informed, by the correspondence which formerly took place between the two governments, that there is a fund arising from the sale of timber, concerning which fund an understanding was had some years ago. It will be expedient to provide, by the treaty, that this arrangement shall be carried into effect.

"A proper article will be necessary to provide for the creation of a commission to run and mark some parts of the line between Maine and the British Provinces.

"These several objects appear to me to embrace all respecting the boundary line, and its equivalents, which the treaty needs to contain as matters of stipulation between the United States and England.

"I have the honor to be, with high consideration, your Lordship's most obedient servant.

"DANIEL WEBSTER.

"Lord Ashburton, &c., &c., &c."

*Lord Ashburton to Mr. Webster.*

"WASHINGTON, *July* 29, 1842.

"SIR: I have attentively considered the statements contained in the letter you did me the honor of addressing me on the 27th of this month, of the terms agreed to for the settlement of boundaries between her Majesty's Provinces and the United States, being the final result of the many conferences we have had on this subject. This settlement appears substantially correct in all its parts, and we may now proceed, without further delay, to draw up the treaty. Several of the articles for this purpose are already prepared and agreed, and our most convenient course will be to take and

consider them singly. I would beg leave to recommend that, as we have excellent charts of the country through which the boundary which failed of being settled by the commissioners under the seventh article of the treaty of Ghent is partially marked, it would be advisable to make good the delineation on those charts, which would spare to both parties the unnecessary expense of new commissioners and a new survey. In this case, the only commission required would be to run the line on the boundary of Maine.

"The stipulations for the greater facility of the navigation of the River St. Lawrence, and of two passages between the Upper Lakes, appear evidently desirable for general accommodation; and I cannot refuse the reciprocal claim made by you to render common the passage from Lake Erie into the Detroit River. This must be done by declaring the several passages in those parts free to both parties.

"I should remark, also, that the free use of the navigation of the Long Sault passage on the St. Lawrence must be extended to below Barnhart's Island, for the purpose of clearing those rapids.

"I beg leave to repeat to you, Sir, the assurances of my most distinguished consideration.

"ASHBURTON.

"Hon. Daniel Webster, &c., &c., &c."

## APPENDIX C.

**Copy of a certified copy from the Department of State, filed with the Clerk, showing the correct reading of Article II of the Treaty of Washington (commonly known as the Webster-Ashburton Treaty).**

Offered under authority of United States *vs.* Reynes (9 How. 147) and Jones *vs.* United States (137 U. S. 214).

(Copy)

No. 7803

UNITED SATES OF AMERICA.

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a true copy from the original in the archives of this Department.

(Article II of the Treaty between the United States and Great Britain to settle and define boundaries; for the final suppression of the African Slave Trade; and for the giving up of criminals fugitives from justice.

Signed at Washington, August 9, 1842.)

In testimony whereof I, Elihu Root, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief Clerk of the said Department, at the City of Washington, this 17th day of March, 1908.

[SEAL.]

ELIHU ROOT,
*Secretary of State.*
By M. CARR,
*Chief Clerk.*

A Treaty to settle and define the Boundaries between the Territories of the United States and the possessions of Her Britannic Majesty, in North America: For the final suppression of the African Slave Trade: and For the giving up of criminals fugitive from justice, in certain cases.

* * * * *
* * * * * *

## Article II.

It is moreover agreed, that from the place where the joint Commissioners terminated their labors under the sixth article of the treaty of Ghent, to wit: at a point in the Neebish Channel, near Muddy Lake, the line shall run into and along the ship channel between Saint Joseph and St. Tammany Islands, to the division of the channel at or near the head of St. Joseph's Island; thence, turning eastwardly and northwardly, around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's from St. Joseph's Island; thence, up the east Neebish channel, nearest to St. George's Island, through the middle of Lake George;—thence, west of Jonas' Island, into St. Mary's river, to a point in the middle of that river, about one mile above St. George's or Sugar Island, so as to appropriate and assign the said Island to the United States; thence, adopting the line traced on the maps by the Commissioners, thro' the river St. Mary and Lake Superior, to a point north of Ile Royale in said Lake, one hundred yards to the north and east of Ile Chapeau, which last mentioned Island lies near the northeastern point of Ile Royale, where the line marked by the Commissioners terminates; and from the last mentioned point, southwesterly, through the middle of the Sound between Ile Royale and the northwestern mainland, to the mouth of Pigeon river, and up the said river to, and through, the north and south Fowl Lakes, to the Lakes of the height of land between Lake Superior and the Lake of the Woods; thence, along the water-communication to Lake Saisaginaga, and through that Lake; thence, to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermillion Lake, and Lake Namecan, and through the several smaller lakes, straights, or streams, connecting the lakes

here mentioned, to that point in Lac la Pluie, or Rainy Lake, at the Chaudière Falls, from which the Commissioners traced the line to the most northwestern point of the Lake of the Woods;—thence, along the said line to the said most northwestern point, being in latitude 49° 23′ 55″ north, and in longitude 95° 14′ 38″ west from the Observatory at Greenwich; thence, according to existing treaties, due south to its intersection with the 49th parallel of north latitude, and along that parallel to the Rocky Mountains.—It being understood that all the water-communications, and all the usual portages along the line from Lake Superior to the Lake of the Woods; and also Grand Portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

* * * * *

Done, in duplicate, at Washington, the ninth day of August, Anno Domini one thousand eight hundred and forty-two.

DANL WEBSTER [SEAL]

ASHBURTON [SEAL]

## APPENDIX D.

**Copy of certified copies from the Department of the Interior, filed with the Clerk, supplementing the correspondence in the record regarding the restoration of certain lands embraced in the temporary reservation of April 3, 1847.**

Offered under authority of Jones *vs.* United States (137 U. S. 215) and Knight *vs.* United Land Association (142 U. S. 169), the latter case holding that the court can take judicial notice of the records of the Interior Department.

1–480. EBF

UNITED STATES OF AMERICA.

[Vignette.]

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., *March* 24, 1908.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as the same appear of record in this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL] FRANK PIERCE
*First Assistant Secretary of the Interior.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

*May 7th,* 1852.

Hon. C. M. CONRAD,
*Sec'y of War.*

SIR:

I have the honor to enclose, herewith, a letter from the Commissioner of the General Land Office dated the 30th

ulto, with certain papers and diagrams exhibiting the locality and extent of the different reservations of public lands in the vicinity of Lake Superior, heretofore made for Military, Naval, and other public purposes. Many of these reservations, it is believed, were unnecessarily large, and with a view to such action as may be necessary to bring into market such of the lands, thus reserved from sale, as are not wanted permanently for the various public uses for which the reservations were originally made, I have the honor to request that you will cause this Department to be informed of the particular tracts, where it may be practicable to do so, which it is desirable should be permanently reserved for Military purposes. I will thank you to have the enclosed papers returned to me at your earliest convenience in order that they may be submitted to other Departments for like purposes.

I am Sir &c.

ALEX. H. H. STUART,
*Secretary.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

*May 26th*, 1852.

Hon. THOMAS CORWIN,
*Sec'y of the Treasury.*

SIR:

I have the honor to enclose, herewith, a letter from the Commissioner of the General Land Office, dated the 30th ulto, with certain papers and diagrams exhibiting the locality and extent of the different reservations of public lands in the vicinity of Lake Superior heretofore made for Military Naval, and other public purposes. Many of these reservations, it is believed, were unnecessarily large, and with a view to such action as may be necessary to bring into market such of the lands, thus reserved from sale, as are not wanted permanently for the various public uses for which the reservations were originally made, I have the honor to request that you will cause this Department to be informed of the particular tracts, where it may be practicable to do so, which it is desirable should be permanently reserved for Light Houses or other purposes connected with your Department.

I will thank you to have the enclosed papers returned to

me at your earliest convenience in order that they may be submitted to the other Departments for like purposes.

I am Sir &c.

ALEX. H. H. STUART,
*Secretary.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

*June 14th*, 1852.

Hon. WILLIAM A. GRAHAM,
*Sec'y of the Navy.*

SIR:

I have the honor to enclose, herewith, a letter from the Commissioner of the General Land Office, dated the 30th of April last, with certain papers and diagrams exhibiting the locality and extent of the different reservations of public lands in the vicinity of Lake Superior, heretofore reserved for military, naval, and other public purposes. Many of these reservations, it is believed, were unnecessarily large, and with a view to such action as may be necessary to bring into market such of the lands, thus reserved from sale, as are not wanted permanently for the various public uses for which the reservations were originally made, I have the honor to request that you will cause this Department to be informed of the particular tracts, where it may be practicable to do so, which it is desirable should be permanently reserved for Naval or other purpose connected with your Department.

I will thank you for a return of these papers with your reply at your earliest convenience.

I am Sir &c.

ALEX. H. H. STUART,
*Secretary.*

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J. H. B. 4–207 r.

DEPARTMENT OF THE INTERIOR, C. L. D. B.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 25, 1908.

I hereby certify that the annexed copies of letters to the Secretary of the Interior from the Secretary of War, dated

May 25, 1852, and from the Acting Secretary of the Treasury dated June 11, 1852, and from the Secretary of the Navy dated June 24, 1852, with copy of enclosure, dated June 18, 1852, and from the Secretary of the Interior to the Commissioner of the General Land Office, dated July 2, 1852, are true and literal exemplifications of the originals thereof on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL] H. W. SANFORD,
*Recorder of the General Land Office.*

WAR DEPARTMENT,
WASHINGTON, *May* 25, 1852.

SIR:

I have the honor to acknowledge the receipt of your letter of the 7th Instant, enclosing papers and diagrams exhibiting the locality and extent of certain reservations of public land in the vicinity of Lake Superior heretofore made for military and other public purposes, and requesting to be informed which of said tracts should be permanently reserved for purposes under the direction of this Department.

In reply to this inquiry I have to state that no reservation will be required by this Department within the region embraced by the maps submitted, except that at Fort Brady.

The maps and accompanying papers are herewith returned.

Very Respectfully
Your Obed. Serv.
C. M. CONRAD,
*Secretary of War.*

Hon. A. H. H. Stuart,
Secretary of the Interior.

NAVY DEPARTMENT,
*June 24th*, 1852.

SIR,

In reply to your letter of the 14th instant, pertaining to reservations of public lands in the vicinity of Lake Superior. I have to state, that I have caused enquiries to be made and have not been able to discover, that any of the lands referred to by you, were reserved for Naval purposes—nor do I per-

ceive, that a proper Naval policy, requires such reservations in that quarter.

The papers transmitted by you, together with the report of the Chief of the Bureau of Yards & Docks, to whom they were referred, are herewith returned.

I am, with great respect
Your Obt. Servant,
WM. A. GRAHAM.

Hon. A. H. H. Stuart
Secy of the Interior

(Copy)

BUREAU OF YARDS & DOCKS
18*th June* 1852.

SIR,

I have the honor to acknowledge the reference to this Bureau of the letter of the Hon. A. H. H. Stuart of the 4th instant, in relation to the "reservation of public lands in the vicinity of Lake Superior, heretofore made for Military Naval and other purposes."

In answer I have to state, that no reservation of any of the lands referred to by the Secretary of the Interior has been asked for by this Department, nor is it aware from any information in its possession that the lands in question will at any time be required for Naval purposes.

I have the honor to be
Very respectfully
Your Obt Svt
(Signed) JAS. SMITH

Hon. Wm. A. Graham,
Secretary of the Navy.

TREASURY DEPARTMENT
11 *June* 1852.

SIR:

I acknowledge the receipt of your letter of the 26th ultimo, relative to the reservation of Lands for public purposes in the Lake Superior Land District, and in compliance with your request, I have the honor to transmit herewith a detailed list of such portions of such reservations as the Department wishes should be retained as sites for Light-Houses.

The selection has been made by the Light-House Board, after a careful examination and is respectfully recommended to your favorable consideration.

Some of the selections of course embrace more land than what will be actually required for the purpose; but in the uncertainty as to the elevation or nature of the ground, it is necessary to retain the whole front of the prominent points until the exact location as to the most suitable spot for the erection of a light house has been ascertained correctly by a special survey. The papers accompanying your letter are returned herewith.

Very Respectfully,

WM. L. HODGE,
*Acting Secretary of Treasury*

Hon. A. H. H. Stuart
Secy of Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON *July 2d*, 1852.

SIR

Your letter of 30th April last enclosing certain papers and diagrams in relation to the reservations of public land on Lake Superior was duly referred to the Secretaries of War, Navy, and the Treasury, for information as to the extent of the permanent reservations which were needed by their respective departments. Their several replies have been received and are herewith sent together with the diagram and papers submitted in your said letter of 30th of April last.

I am Sir
Very respectfully
Your obt. Servant
ALEX. H. H. STUART
*Secretary*

To the
Commissioner
of the General Land Office

## APPENDIX E.

**Copy of a certified copy from the Department of Justice, filed with the Clerk, showing the relation to this case of Duane E. Fox as special counsel.**

Offered under authority of Western Pacific Railroad Company *et al. vs.* United States (108 U. S. 510) and Mullan *vs.* United States (118 U. S. 271), which allow production of certified copies to show the interest of the United States in a suit.

(Copy)

UNITED STATES OF AMERICA.

DEPARTMENT OF JUSTICE,
*March* 24, 1908.

Pursuant to the Act of Congress of March 5, 1872, I hereby certify that the annexed papers are a true copy of the original letters on file in this office,

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

[SEAL] M. D. PURDY
*Acting Attorney General.*

O. J. F.
986–1903

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C.
*February* 2, 1903.

DUANE E. FOX, Esq.,
*Loan and Trust Building,*
*Washington, D. C.*

SIR:

You are hereby appointed a Special Assistant to the United States Attorney for the Western District of Michigan in the matter of instituting a suit against the Chandler-Dunbar Water Power Company.

Your compensation, which will be nominal, will be deter-

mined by the Attorney General upon the completion of your service.

Please execute the enclosed oath of office and return it to this Department.

Respectfully,
J. K. RICHARDS,
*Acting Attorney General.*

Duane E. Fox,
Attorney and Counselor at Law,
Washington Loan and Trust Co. Building,
Cor. Ninth and F Streets, N. W.,
Washington, D. C.

JULY 7, 1905.

*The Honorable*
*The Attorney General,*
*Washington, D. C.*

SIR:

In United States *vs.* Chandler-Dunbar Water Power Company, now pending in the Circuit Court of the United States for the Western District of Michigan, Northern Division, I beg to report my return from Grand Rapids where the case was heard last week and was taken under advisement by the Court. A decision is expected very shortly, probably before the end of next week.

At the hearing the argument was made by myself at the suggestion and request of the United States Attorney, who sat with me at the counsel table but who did not otherwise participate in the oral argument. The argument was not reported stenographically, but at its conclusion I addressed myself briefly to a phase of the case which arose during the argument and which seemed to me of sufficient importance to require that a stenographic report be laid before you, which report I beg to enclose herewith.

The matter referred to concerns my relations to this case and to your Department and involves criticism of such relations by counsel for the defendant. I beg therefore to say that, if my connection with this case is in the least degree embarrassing to your Department, I ask to be relieved from further duty in the matter.

Very respectfully,
DUANE E. FOX,
*Special Assistant U. S. Attorney.*

G/F

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DEPARTMENT OF JUSTICE,
WASHINGTON.

*July* 8, 1905.

DUANE E. FOX, Esq.,
*Special Assistant to the United States Attorney*
*for the Western District of Michigan,*
*Washington, D. C.*

SIR:

Replying to your letter of July 7, relative to a certain interchange between counsel at the argument at bar in United States *v.* Chandler-Dunbar Water Power Company, touching upon the good faith of the Department in bringing that litigation, and the relations between you and the Government on the one hand, and your relations to certain private clients on the other, I have to say that I have noted remarks of opposing counsel in their brief on these points, and the stenographic report of that part of the oral argument which you transmit.

I am not disposed to regard any suggestion in the nature of criticism along this line, whether open or veiled and covert, as material or entitled to any further attention. Within my own exact knowledge such criticism is entirely without foundation, and, especially in view of the sensible and just comments of Judge Wanty upon the matter, as shown in the stenographic report, I think that the subject may be dismissed from further consideration. It seems to me preposterous to suggest that, because the Department of Justice, in pursuance of a duty, definitely imposed upon it by another Department and plainly committed to its full exertions by all considerations of public interests and responsibility, initiates a litigation which turns out, after preliminary investigation, to involve larger aspects and other questions than the original point proposed, therefore the Department has for some unexplained reason done more than it should have done or acted contrary to the fullest good faith. It is for the Department to determine what it ought to do in the conduct of litigation, and the suggestion of unfairness in any respect is not in the slightest degree sustained by the facts. Consequently, I beg to add that your connection with the case is in no way embarrassing to the

Department, and that we have no intention or desire to relieve you from further duty in the matter.

Respectfully,

H. M. HOYT,
*Acting Attorney General.*

OFFICE OF THE ATTORNEY GENERAL, CBS
WASHINGTON, D. C.

C. B. S.
986–1903.

*August* 2, 1905.

DUANE E. FOX, Esq.,
*Washington Loan & Trust Co. Building,*
*Washington, D. C.*

SIR:—

Your appointment, dated February 2, 1903, as "Special Assistant to the United States Attorney for the Western District of Michigan in the matter of instituting a suit against the Chandler-Dunbar Water Power Company", is hereby amended so that your compensation, instead of being nominal, shall be such sum as may be determined upon by the Attorney-General at the completion of your services in the institution and prosecution of this suit. Such compensation shall cover all services rendered by you in this case since the date of your original appointment.

Respectfully,

J. C. MCREYNOLDS,
*Acting Attorney-General.*

S. G. OFFICE OF THE ATTORNEY GENERAL, E. W.
C. B. S. WASHINGTON, D. C.

*February* 4, 1908.

DUANE E. FOX, Esq.,
*Washington Loan and Trust Building,*
*Washington, D. C.*

SIR:—

Your appointment as a Special Assistant to the United States Attorney for the Western District of Michigan is hereby terminated, and you are appointed a Special Assistant to the Attorney General in the case of the United States *v.* the Chandler Dunbar Water Power Company, pending in the Supreme Court of the United States.

Your compensation will be determined by the Attorney General upon the completion of your service.

This appointment is subject to any change which may be made by this Department.

You should execute and file with this Department the customary oath of office.

Respectfully,

CHARLES J. BONAPARTE,
*Attorney General.*

## APPENDIX F.

**Copy of a certified copy from the Department of State, filed with the Clerk, showing the correct reading of a sentence in the letter from the Secretary of State to Lord Ashburton, dated July 27, 1842.**

(Offered under authority of United States *vs.* Reynes (9 How. 147) and Jones *vs.* United States (137 U. S. 214).

(Copy.)

No. 7894.

UNITED STATES OF AMERICA

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the document hereunto annexed is a true copy from the original in the records of this Department.

In testimony whereof I, Elihu Root, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief Clerk of the said Department, at the City of Washington, this 27 day of March, 1908.

[SEAL]

ELIHU ROOT,
*Secretary of State.*
By W J CARR,
*Chief Clerk.*

*Extract of Letter from the Secretary of State to Lord Ashburton.*

DEPARTMENT OF STATE,
WASHINGTON, 27*th July*, 1842.

MY LORD.

* * * * * * * * * * * * * *

It being understood that all the water communications, and all the usual por.ages along the line from Lake Su-

perior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the subjects and citizens of both countries.

* * * * * * * * * * * * *

I have the honor, etc.,

DANL. WEBSTER.

Lord Ashburton,
etc., etc., etc.

No. 599

# United States Supreme Court

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**United States of America,**
**Appellant**

**vs.**

**Chandler-Dunbar Water Power Company,**
**Appellee**

---

**Appeal from the United States Circuit Court of Appeals, Sixth Circuit, Reviewing the Judgment of the Circuit Court of the United States for the Western District of Michigan, Northern Division.**

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**OCTOBER TERM, 1907.**

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## BRIEF OF APPELLEE.

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### NATURE OF CASE.

Bill to quiet title to islands one and two in the water communication between Lakes Huron and Superior, called by the appellant "St. Mary's Strait" and by appellee "St. Mary's River."

## ISSUES.

**THE COMPLAINT** states that

The United States "is the owner of islands number one and two in the Straits of St. Mary within * * * the north half of section six, township forty-seven north, range one east, (Rec. 1), title coming from Great Britain to the United States through state of Virginia (Rec. 1 to 6.)

By the Treaty of Washington, it was agreed that "all the water communications along the line so established 'shall be free and open to the citizens and subjects of both countries.'" (Rec. 4.)

It is not competent to the state of Michigan to pass title to the subaqueous lands under the Strait of St. Mary, to the riparian owner, on account that such strait is international water, and that such transfer of title would complicate the United States in its treaty relations with Great Britain.

United States made patent to Wm. Chandler, grantor of defendant, of the south shore of St. Mary's Strait, adjacent to islands one and two, on December 15, 1883, under which patent defendant claims title to islands one and two.

Such patent was issued by mistake. (Rec. 15.)

Such patent was void, because

**FIRST.** Of land within executive reservations of April 3, 1847 (Rec. 8), and of September 2, 1847 (Rec. 8), and reservations of War Department, March 10, 1852, and August 5, 1852 (Rec. 16).

**SECOND.** Of land not surveyed. (Rec. 15.)

**THIRD.** Patentee then superintendent, under the War Department, of the St. Mary's Canal. (Rec. 14.)

**FOURTH.** Based on location of Porterfield Scrip on land then within the limits of a corporate village. (Rec. 14.)

Complainant has title by adverse possession and statute of limitations of state of Michigan.

Value of islands exceeds $50,000.

Defendant's claim thereto "threatens to be a source of embarrassment in its international relations with Great Britain."

WRITING CLOSE TO E

ISSUES

**THE ANSWER:**

Denies title of the United States to the islands. Alleges title in the defendant through the Chandler patent. (Rec. 20.)

Alleges that it was not agreed "by said treaty of Washington that the waters of the river St. Mary 'shall be free and open to the citizens and subjects of both countries.'" (Rec. 22.)

Alleges that it was competent to the State of Michigan to pass title to the subaqueous lands under the river of St. Mary to the riparian owner, and that the defendant's ownership of said islands "is not in any way inconsistent with, or in derogation of, the international and sovereign obligations of the complainant to or with Great Britain, and has no relation thereto, and does not threaten to become a source of embarrassment to the United States." (Rec. 27.)

Denies that the patent was issued by mistake. (Rec. 23.)

Denies that the executive reservations of April 4, 1847, September 2, 1847, and the designation of the War Department of March 10, 1852, and August 3, 1852, operated as a reservation of the lands patented to Chandler on account that the same were, during all that time, subject to the Indian right of occupancy under treaty June 16, 1820. (Rec. 22-3.)

Alleges that the lands in controversy were released from the executive reservations (if ever under reservation) by act of Congress September 25, 1850 (9 Stat. 459), and by action of the War Department and the Department of the Interior under the same; and by act of Congress August 26, 1852 (10 Stat. 25), called the Canal Act, and the location of the canal grant, and executive order of release December 9, 1852 (Rec. 22-3).

Alleges that the land was surveyed under the regular United States survey in 1845, and again under a special survey by Thomas Whelpley under act of Congress, approved September 26, 1850 (9 Stat. 469). (Rec. 28-9.)

Denies that the patentee, Chandler, held any Federal office at the time of location. (Rec. 25.)

Denies adverse possession of the United States, and alleges possession in the defendant and its grantor from the date of the patent to the 23rd day of March, 1903. (Rec. 27.)

Alleges the islands "are of no value to the United States or to any person or corporation other than this defendant

Their value to this defendant is on account of their relation to the water power developed, and to be developed, on complainant's adjacent riparian lands." (Rec. 32.)

Alleges that islands have no relation to, or bearing upon, or value in connection with, the improvement of the navigation of the St. Mary's River (Rec. 32); and no relation to the international relations of the United States with Great Britain. (Rec. 32-3.)

Alleges that the water in which they lie is a river, not a strait. (Rec. 28.)

Alleges that they were left unsurveyed because insignificant and, for the purposes of the United States, valueless, and worth only a small fraction of the necessary expense of surveying them. (Rec. 28-9.)

Description of the St. Mary's river at the point in controversy. (Rec. 30.)

Description of the islands and their location. (Rec. 31.)

Alleges that complainant is estopped from attacking defendant's title to the upland because of

The adjudication on Chandler's application; the lapse of time since the patent was issued; the retention of the Porterfield scrip by the United States; defendant's *bona fide* purchase for value from the patentee; payment of taxes and large expenditures upon the upland and complainant's dealing with defendant as the owner of the lands. (Rec. 31-2.)

Alleges that the "object of this action * * is not to further or protect any interest of the United States," nor to protect "its property, nor to vindicate itself, nor in order to enable it to do justice * * or to fulfill its obligations * *. On the contrary, the object * * is to aid the Michigan-Lake Superior Power Company in an attempt to divert" from defendant's riparian lands "the waters of the St. Mary's River, for which diversion an act of Congress, approved June 13, 1902, is claimed as authority." (Rec. 33.)

Pleads U. S. Statute of Limitations (Rec. 36-7).

On the trial the complainant abandoned its claim, under the statute of limitations.

Defendant limited its claim that the suit was not in behalf of the United States to the point that the attack upon the Chandler patent to the uplands was not in behalf of the United States.

# LEGAL POINTS

I.

**SHOULD THE ATTACK ON THE PATENT** involved in point II., **BE DISREGARDED** on account that same is **not by authority of the United States,** but in the interest of the Michigan-Lake Superior Power Co.?

II.

**IS PATENT** United States to Wm. Chandler of the main land, over against which the islands lie, **VOID** because, as is claimed by the United States,

FIRST: Said land was **under reservation** when located?

SECOND: Said land was **never legally surveyed?**

THIRD: Land was **in incorporated village** when located?

III.

**IS UNITED STATES ESTOPPED** to claim invalidity of this patent, because of,

FIRST: The **decision of the Secretary of the Interior** relative to the issue of the same, and acquiescence of the United States therein, and the improvements made on the land under the patent, and retention of Scrip?

SECOND: **Statute of limitations?**

IV.

**DID TITLE TO ISLANDS** one and two pass to William Chandler, riparian, **by patent of the mainland?**

This is the only point which should be in the case, as it seems to us. But the attack upon the patent has been injected into it. Hence we discuss its validity.

# ARGUMENT

## I.

## ATTACK ON PATENT UNAUTHORIZED.

We here quote statement of facts from Judge Severens' opinion:

"In order to understand the grounds on which the decree was rested and also for the purpose of disposing of an objection raised here by the appellee and based on one of the grounds taken by the court below, it is necessary to make a preliminary statement of some special facts There is a fall in the St. Mary's River along the front of the Chandler tract of about nine feet, the benefit of which the defendant wished to preserve. The Michigan, Lake Superior Power Company was proposing to divert the water of the river at a point above the Chandler tract, but on the same shore, and carry it behind that tract for the purpose of using it for power. Sharp controversy on this subject was pending between those parties when on November 26, 1901, one of the attorneys employed by the Michigan, Lake Superior Power Co. made application to locate some scrip on these islands and a narrow strip of land along the adjacent margin of the river. (Rec. 561-564-568-9-0). This strip would separate the land described in the Chandler patent from the bed of the stream. In March ,1902, the defendant brought suit by bill in equity against the Michigan, Lake Superior Power Co. in the State Circuit Court to restrain the threatened diversion of the water. (Rec. 577-582.) The defendant in that suit answered, admitting the title to the mainland under the Chandler patent, but alleging that the title to the bed of the river was in the State. (Rec. 583, 635.) Shortly thereafter, the Michigan, Lake Superior Power Co. employed an attorney at Washington to promote the application of the before mentioned attorney to locate the islands and the marginal strip by virtue of the scrip as aforesaid. This was in December, 1902. (Rec. 663.) In January following the Secretary of the Interior requested the Attorney General to bring a proper action to obtain a judicial determination whether unsurveyed islands in the connecting waters of the Great Lakes passed by grants of the riparian tracts. (Rec. 743.) In February following, the Washington attorney of the Michigan, Lake Superior Power Co. was employed as special

assistant to the United States Attorney at a nominal consideration to be thereafter determined by the Attorney General. (Rec. 665.) In April following, a bill was filed by the District Attorney in behalf of the United States against the defendant in the court below to settle the question which the Secretary of the Interior had proposed. It assumed the validity of the Chandler patent, but complained that the defendant asserted title thereunder to the islands. This bill was subsequently withdrawn. (Rec. 658-663.) On September 2, 1903, the present bill was filed bearing the signature of the United States Attorneys and of the special assistant employed in behalf of the United States as before stated. (Rec. 1-18.) On the following day the Michigan, Lake Superior Co. moved in the State Court for leave to withdraw the admission it had made in its answer of title to the mainland in the complainant, (the defendant here) on an affidavit that from investigations at Washington made by its counsel, it had learned that the complainant (in that suit) had no title therein. (Rec. 635, 657.) The learned Judge in the court below, the late Judge Wanty, after referring in his opinion to the presence of the representative of a private party in the promotion of the suit, refused to consider the validity of the Chandler patent, saying:

'The patent to the shore or upland, issued December 15, 1883, to the defendant's grantor, is attacked in the bill for the purpose of defeating any claim of the defendants to these islands, but those allegations will not be considered by the court, as they raise no questions which the United States has any interest in having determined in this suit. If in this case it should be held that the patent to the upland is invalid, then the title to these islands for that reason would be in the United States, and the only question for the determination of which this suit was authorized would be entirely eliminated, as any expression of opinion as to what the status of these islands would have been if the patent had been valid instead of invalid would be obiter dictum. The complainant does not here ask to have this patent set aside, and if it seriously questioned its validity for any reason set up in the bill of complaint its officers would undoubtedly take steps to annul the patent and resume title and possession, of the valuable land on the shore as well as to these insignificant islands, whose only value to the complainant, if it does not own the upland, seems to lie in

their position to form the subject matter of a cause for the determination of the question for the adjudication of which this suit was authorized to be instituted in the name of the United States.'" (Rec. 45-6.) (152 Fed. Rep. 27-8.)

We claim that the facts recited show that the attack upon the Chandler Patent is not made by authority of, or for the benefit of, the United States, but of the M. L. S. P. Co. by its attorney, Mr. Fox, in its employ. The United States permits the M. L. S. P. Co. to speak in its name. Truly, "The voice is Jacob's voice; but the hands are the hands of Esau."

The Secretary of the Interior wished to know, for benefit of General Land Office, if title to unsurveyed islands "in St. Mary's river or strait" passed by patent of the adjacent mainland under the rule in Railroad vs. Butler. By his letter of January 21, 1903, (Rec. 255) he requested the Department of Justice to cause suit to be instituted to determine that question. That letter is produced by complainant's counsel as justification for the conduct of this suit by special counsel, Mr. Fox. Mr. Fox's special fitness to present the question fully justifies his employment as special counsel herein, so far as he conducts the contention in the interest of the United States.

But, unquestionably, the facts recited, show that his employment was nominally by, and in the interest of, the United States, but really by, and in the interest of, the M. L. S. P. Co. Unquestionably the attack upon the Chandler patent is in the interest of the M. L. S. P. Co. and not the United States. Such attack, if successful, prevents any decision of the question,—Does the patent of the adjacent mainland carry title to the islands?—which is the sole object for which the Secretary of the Interior asked that the action be commenced.

This view is strengthened by contents of letters Secretary of the Interior to the Commissioner of the General Land Office, January 21, 1903. (Rec. 742-3.) Commissioner of the General Land Office to Mr. Shine, November 1, 1904. (Rec. 743.) And Mr. Caldwell's transcript of Judge Van Devanter's statement. (Rec. 695-6.)

These and other documents show that, on making request that Department of Justice institute this action, the Department of the Interior suspended action in "All cases involving unsurveyed islands situate in waters connecting the Great Lakes * * pending the determination of the title of such islands

by the courts." (Rec. 743.) For all that appears, that class of cases is still suspended to await such adjudication.

The point could not well be made plainer than by Judge Van Devanter, when he said to Mr. Caldwell:

"The purpose of this department in suggesting the suit is not merely to determine the question of private interest in which Mr. Fox is interested, and to enable some of his clients to obtain title to one of these islands as public land, but it is rather to establish the public ownership of these islands."

By "these islands," Judge Van Devanter did not mean the specific islands involved herein, but islands of the same class. He says, "and thereby to protect and preserve the enormous expenditures and works which have been constructed upon some of them." (Rec. 696.) No expenditures have been made upon either of the islands in controversy. They are of no substantial value and of no value for use in aid of navigation.

Mr. Fox's letters of March 24, 1904, (Rec. 689-692) and July 14, 1904, (Rec. 692-698) to the Attorney General, are very full upon the point to secure adjudication on which the Interior Department was anxious, but do not mention this feature of the case, or call the Attorney General's attention to any approval by him, or any of his assistants, of any attack on the Chandler patent. Mr. Fox's letters refer to the letter Secretary of the Interior to the Department of Justice, as stating the public interest to be subserved by the action, saying,

"It is to the interest of the government that it should be adjudged that title to such islands does not pass from the United States by grant of the shore lands."

The Chandler-Dunbar Water Power Company, in its action against the M. L. S. P. Company, seeks to prevent the M. L. S. P. Company from diverting the waters of the St. Mary's river from its land on the south bank of the river. This action will not be defeated by defeating the Chandler-Dunbar Water Power Company's claim of title to the islands. But it will be defeated by defeating the Chandler-Dunbar Water Power Company's title to its mainland. If it owns the mainland it has a riparian right to restrain the diversion of the water from its riparian land above island No. 1, whereon is a fall of four feet. (Rec. 264.) This right to restrain diversion, and use the water for power, is one which attaches, not only to the subaqueous

lands, but to the riparian lands. It is a riparian, or bank, right,—a right not dependent upon the riparian ownership of the subaqueous lands. (1).

Gould says,

"Riparian rights proper depend upon the ownership of land contiguous to water, and are the same whether the proprietor of such land owns the soil under water or not."

He further says, quoting from Lord Selbourne in the Fishmongers case,

"It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good **jure naturae** as vertical."

Hence the interest of the M. L. S. P. Co. in the attack upon the Chandler Patent to the mainland, and the reason of the amendment to its answer in the diversion case, and the concurrent filing of the second bill (this bill) United States vs. Chandler-Dunbar Water Power Company attacking patent.

A review of the documents and letters and testimony relative to the conduct of this case shows plainly that the attack upon the Chandler patent is injected into the case by Mr. Fox, not in the interest of the United States, but in the interest of his client, the M. L. S. P. Co. Mr. Fox says in his letter of March 24, 1904, (Rec. 689.)

"None of my other clients, however, have any claim to, or interest in ,the islands which are the subject matter of this suit." (Rec. 691.)

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NOTE 1—Morrill vs. Water Power Co., 26 Minn., 222, (1879);
Minneapolis vs. Milling Co., 26 Minn., 229, 232, (1879);
Gould on Waters, 3rd Edition, Sec. 148 and cases cited.
Wisconsin River Impt. Co. vs. Lyons, 30 Wis., 61, (1872);
Boom Co. vs. Reilly, 44 Wis., 295, 304 (1878);
Diedrich vs. R. R. Co., 42 Wis., 248, 262, (1877);
Lyons vs. Fishmongers, 1 Appeal Cases, 662, (1876);
Same case, 10 Chan. 679, (1875);

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He also says in his letter of July 14, 1904, (Rec. 695.)

"My client in that case" (the diversion case) "also makes no claim to the subject matter of the present suit, but it is evident that it is greatly interested in the result thereof, inasmuch as its defense in the Michigan Courts is identical with the position taken by the United States in the Federal Courts. By reason of this identity of interest in the legal principle involved, I was, and am, willing to co-operate in the suit of the United States against the Chandler-Dunbar Water Power Company for the nominal compensation stated in my appointment."

Ch-D. W. P. Co.'s title to mainland is conceded in first answer of M. L. S. P. Co. to complaint of Ch-D. W. P. Co. (Rec. p. 583) and in first bill United States vs. Ch-D. W. P. Co. (Rec. 659-660). Such title is denied in amended answer of M. L. S. P. Co. (Rec. 636-641) and in the bill herein (Rec. 14-5-6). The affidavit for leave to amend answer was made Sept. 2, 1903 (Rec. 640). Bill herein was verified Sept. 2, 1903 (Rec. 18). Same guiding hand.

Mr. Fox's client is especially interested in the attack on the Chandler patent, which attack is the foundation of its defense in the diversion case. On trial there was nothing to show that the United States wished to make any such attack. An attempt is made to show that the Attorney General authorized such attack by the testimony of a clerk in the Department of Justice, Mr. Caldwell. But the attempt fails. It appears from his testimony that the original bill, filed and recalled by Mr. Covell, was immediately sent to Mr. Fox when it was withdrawn, and that the new bill was drawn by Mr. Fox while Mr. Caldwell was away from Washington. (Rec. 701-2.)

Mr. Fox states that "My client in that case makes no claim to the subject matter of the present suit." This evidently refers to islands one and two. As to that matter, we call attention to the application of Mr. Fox's client's attorney, Mr. Wm. B. Cady, to enter with Porterfield Scrip islands one and two, and a narrow strip of shore land represented by him to lie between the Whelpley meander and the Mullet meander, or the actual shore-line (See O'Hare's tracing and Cady's application.) Evidently Mr. Fox's client, the M. L. S. P. Co., plans to have the first claim on islands one and two, if they can be wrested from the Chandler-Dunbar Water Power Company.

It is noticeable that the stream theretofore universally called St. Mary's River by the United States and by the M. L. S. P. Co., is called a strait simultaneously in M. L. S. P. Co.'s answer to complaint of defendant herein for diversion (Rec. p. 583), and in letter Secretary of Interior to Department of Justice, January 21, 1903 (Rec. p. 255), and in complaint in first action United States vs. Ch-D. W. P. Co. (Rec. p. 659), and in complaint herein (Rec. p. 71). Here is evidence of the same guiding hand in all these documents. Further respecting this change in name, see this brief "RIVER OR STRAIT."

Mr. Fox's employment is contrary to the Act of Congress, May 1, 1884. (23 Stat. 17;) Comp. Stat., Sec. 3679, "Hereafter no department or officer of the United States shall accept voluntary service for the government."

This statute is only declaratory of the law as it had been previously settled by the decisions of the United States Supreme Court. (2).

The M. L. S. P. Co. is not entitled to equitable consideration. It is in position of one watching to take advantage of the mistakes of others: first, by attempted Cady location; second, by the attack on the Chandler patent. Of such, Chief Justice Marshall says,

"He either did not mean to acquire the land within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; but it does not follow that equity will aid his views, and give more than the law gives him." (Taylor vs. Brown, at 235.)

In United States vs. San Jacinto Tin Co., Mr. Justice Field says,

"Not for the interest of the United States, not for the protection of their property, or to vindicate their honor, but at the request of a private litigant, the name and power of the United States are invoked by the Attorney General to set aside a patent issued after a protracted contest upon the survey with the predecessor of this litigant."

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NOTE 2—U. S. vs. San Jacinto Tin Co., 125 U. S., 273 (1888);
U. S. vs. Throckmorton, 98 U. S., 61 (1878);
Taylor vs. Brown, 9 U. S., 234 (1809).

"If this were a solitary instance where the name and power of the United States have been used to serve the interests of private parties, it might be passed by with the simple statement of facts. But, unfortunately, it is not a solitary instance. The records of this court show that it has been a frequent practice of the Department of Justice in authorizing suits for the cancellation of patents." (303.)

"I cannot admit that the Attorney General can, at the request of private parties, rightfully allow the use of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them. * * * * * The principle condemned is the same, whether the party rendering the service does so without any charge, or because paid by other parties. * * * * *

It is not to be supposed that any head of the Department of Justice has or would intentionally lend the name and power of the government to further private ends, and yet there is no practical difference between that course of procedure and the one adopted in this case." (305.)

"Whenever Congress has felt it important that patents for lands should be revoked, either because of fraud in their issue, or of breach in conditions in them, it has not failed to authorize legal proceedings for that purpose. In a multitude of cases titles to lands, upon which whole communities live, rest upon patents of the United States. In several instances, cities having more than a hundred thousand people residing within their limits are built on land patented by the government. I cannot believe that it is within the power of the Attorney General, to be exercised at any time in the future, this generation or the next—as no statute of limitations runs against the government—to institute suits to unsettle the title founded upon such patents, even where there are allegations of fraud in obtaining them. There must be a time when such allegations will not be heeded." (306.)

In United States vs. Throckmorton, Mr. Justice Miller says,

"It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the government for costs,

and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the name of the United States to declare the patent void. It is essential, therefore, to such a suit, that without special regard to form, but in some way which the court can recognize, it should appear that the Attorney General has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause." (71.)

**After entry of judgment** dismissing bill, Mr. Fox sought, on **motion for rehearing**, to brace up the claim that the United States wished to attack the Chandler patent. To that end, there were written letter of July 28, 1905, Acting Attorney General Hoyt to Secretary of Interior, and reply of Acting Secretary of Interior to Attorney General of August 4, 1905. (Rec. 53-4-5-6). Armed with these, he attacked Judge Wanty's decision. To this, Judge Wanty replied,

"Now this showing * * * does not relieve the situation from the large facts that are in it."

"Now what was said at the bar, and what is filed in Court, does not change my mind about it." (Rec. 67.)

It seems singular that these letters between the Department of Justice and of the Interior, upon so important a matter, and with the serious purpose of securing a rehearing in this case, should not carry with them the weight of the heads of the departments, but should have been by the Acting Attorney General and the Acting Secretary of the Interior. (Rec. 55-6.)

The object of suit is plainly stated by the Secretary of the Interior in his letter of January 21, 1903, to the Department of Justice (Rec. 255-6-7). It would seem that any **ex post facto** letter intended to show that the Interior Department had changed its view respecting the desirability of securing adjudication of the question should have the sanction of the Secretary rather than the Acting Secretary. We have no evidence that the Secretary has changed his views. Indeed, the absence of any letter from him is potent proof that his department still desires the adjudication asked for. There is no reason for, nor evidence of, change of policy in the Interior Department. We do not assume to improve upon Judge Wanty's statement of the reasons for disregarding the attack upon the patent, and for refusing a rehearing. (His decision Rec. 45 to 49. His opinion overruling motion for rehearing Rec. 66-7-8.)

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On trial Judge Wanty found the fact according to Respondent's contention.

On this point the Circuit Court of Appeals said, by Judge Severens: "We think, however, that the question of the propriety of employing an attorney for a private party to assist in the prosecution of a suit by the United States in the public interest is one addressed to the judgment and discretion of the Attorney General, who is charged with the responsibility for the conduct of the suit. If the object of the private party and that of the United States are one and the same, there would seem to be no sound objection. If, however, the name and authority of the United States were likely to be perverted to the promotion of a merely private object, one in which the public has no interest, such facts would indicate the impropriety of such a course, and might in some circumstances rightly influence the judgment in the case. For the reason that in the present case we find no ground for entertaining this objection as a foundation for judicial action in the disposition of the case upon its merits, we overrule it. But of course there will remain to us the duty of considering and determining what results ought to follow from the particular facts exhibited by the record and from the manner and occasion in which those facts are presented to the court for judgment." (152 Fed. Rep. 28.)

"We are much impressed by the contention of the appellee that the Court below was right in holding, as it did, that upon this bill, the question of the validity of the Chandler patent is not a legitimate subject of inquiry. It is not a direct attack. There is no prayer that the patent be declared void. Nevertheless such a decree as is asked in favor of the complainant, if it were rested upon the ground of the invalidity of the patent, would, as we suppose, operate as an estoppel in favor of the United States and of any grantee to whom it might convey." (152 Fed. Rep. 30.)

We still urge that "the validity of the Chandler patent is not a legitimate subject of inquiry" herein.

II.

## PATENT TO MAINLAND IS VALID.

### NOT UNDER RESERVATION.

Claim is made that the **patent** of the main land adjacent to Islands one and two, is **void**, because, as is alleged,

FIRST: Said land was **under reservation** when located.

**Was the main land under reservation when located?**

### NO AUTHORITY TO RESERVE.

Presumably all orders of reservation relied on rest upon the last clause of Sec. 2, Act March 1, 1847 (9 Stat. 146), which says: "All the lands * * shall be sold * * excepting and reserving from such sales * * such reservations as the President shall deem necessary for public uses."

**The act of 1847 did not authorize reservation from sale of the Indian Reserve.**

This Reserve was provided for by treaty, which was a law under the constitution. (Const. Art. VI.)

The treaty provides,

"Art. 3. The United States will secure to the Indians * * * a place of encampment upon the tract hereby ceded, convenient to the fishing ground, which place shall not interfere with the defences of any military work which may be erected, nor with any private rights." (7 Stat. 206.)

Its boundaries were surveyed in 1845, (Rec. 121-2), and it is shown in the plat of survey.

Thus it is seen that the tract, Indian Reserve, had been by law appropriated and set aside for the use of the Indians two years before the act of March 1, 1847, (9 Stat. 146), was passed.

Shortly after the act of March 1, 1847, was passed, the President received from the Secretary of the Treasury a diagram upon which, colored green, was the N. fr. ½ of Tp. 47 N., R. 1 E., which he desired reserved "until the requisite investigation can be had." (Rec. 137-8.) (Diagram Blue Prints, Compts. Ex. 11.)

Thereupon President Polk, on April 3, 1847, made the order of reservation:

"Let the lands designated in the accompanying letter of the Commissioner of the General Land Office be reserved from sale as recommended by him." (Rec. 138.)

That this order of the President was based on the act of March 1, 1847, is seen in the letter of the Commissioner of the General Land Office, August 27, 1847, to the Secretary of the Treasury, wherein he said: "Fractional Sections 4, 5 and 6, Township 47 North, Range 1 E., were reserved for public uses under the act of 1st March, 1847, with other lands, by order of the President, of April 3, 1847." (Compts. Ex. B or Ex. 12, Rec. 139.)

The Executive reservation of September 2, 1847, was also based on the law of March 1. The Commissioner of the General Land Office, on August 27, 1847, in the letter just cited, asks that an "application be made to the President for the reservation of fractional sections 1 and 2, Township 47 North, Range 1 West, under the same act, for the use of Fort Brady."

The Secretary of the Treasury, August 30, 1847, requested the President to reserve "under act of 1st of March, 1847," the lands last above described.

The reservation of President Polk of September 2, 1847, of lands in fractional sections 1 and 2, Tp. 47 N., R. 1 W., and sections 4, 5 and 6, of Tp. 47 N., R. 1 E., was,

"Let the public lands described in this communication and in the accompanying one from the Commissioner of Public Lands be reserved from sale for the use of Fort Brady." (Compts. Ex. B., Rec. 139.)

The act of March 1, 1847, upon which these Executive orders in 1847 were based, did not authorize the President to reserve lands which were not public lands and subject to sale. Section 2 provided that a survey of the mineral lands should be reported, and as to non-mineral lands the law provided,

"And all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands under the laws now in force for the sale of the public lands, excepting and reserving from such sales * * * such reservations as the President shall deem necessary for public uses."

The Indian Reserve, however, having ceased to be public lands when the act was passed, having been set apart and ap-

propriated by law as a reserve, could not be included in the sales, and therefore would not come within the exception, and no authority was therefore given to the President to reserve it from sale. (3). It cannot be said that because the Indian Reserve was not mineral lands, and was not in section 16, that the act of March 1st authorized its sale unless reserved by the President, for the reason that the act did not embrace, include or operate upon the Indian Reserve.

Wilcox vs. Jackson was ejectment by defendant in error.

In 1824, the Secretary of War requested the Commissioner of the General Land Office to direct a reservation to be made for the use of the Indian department at that post; and in October, 1824, the Commissioner colored and marked upon the map the section as reserved for military purposes, and directed it to be reserved from sale for those purposes. In 1835 one Beaubean made claim for pre-emption of the land in question at Chicago; his claim was allowed, and he paid the purchase money and procured the register's certificate thereof.

Beaubean sold and conveyed his interest to plaintiff's lessor.

It was argued that by the fourth section of the act of June 26, 1834, the President was authorized to cause to be sold all the lands in the northeast district of Illinois, embracing the land in question, with certain reservations only, in which, it was contended, the land in question was not included; that a proclamation was issued directing various lands in said district to be sold, among which was the land in question, unless excepted by the words: "The lands reserved by law for the use of schools and for other purposes will be excluded from the sale;" and that an extended plat was forwarded from the General Land Office marking and coloring certain lands to be reserved from sale, but that the land in question was not so marked or colored to be reserved from sale. The court held

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NOTE 3—Wilcox vs. Jackson, 38 U. S., 496, (1839);
United States vs. Paine, 2 McCrary, 289.
Missouri Ry. vs. Roberts, 152 U. S. 114, (1894);
Scott vs. Carew, 196 U. S., 100, (1905);
Spaulding vs. Martin, 11 Wis., 262, (1860);
Leavenworth vs. United States, 92 U. S. 733, (1875);

that the act of June 26, 1834, did not apply to the case, and said,

"But we go further and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservation were made of it." (513.)

In Leavenworth, L. & G. Rd. vs. U. S., it was held that general words in a grant of lands do not include an Indian reservation.

Bill by United States to confirm and establish its title to, and enjoin appellant company from setting up any right or title to, certain tracts of land situated within the Osage ceded lands in Kansas.

The possession of the lands in question previous to 1863 had been reserved by treaty to the Osages.

The granting act was approved March 3, 1863. The Osage treaty relinquishing the rights of the Indians was adopted September 29, 1865, and proclaimed January 21, 1867. Upon the act and the treaty, appellant company rested its claim to the lands in question, insisting that the act, although not operating upon any specific tracts until the road was located, then took effect upon those in controversy, as they, by reason of the extinction of the Osage title in the meanwhile, had become, in the proper sense of the term, public lands. The act was in the words: "There be and is hereby granted," which the court held to be words of absolute donation importing a grant *in praesenti,* and vesting a present title, which needed only a survey of the lands and location of the road to give precision to it and attach it to any particular tract; but holding that the lands in question, being reserved to the Indians at the date of the act, were not embraced in it.

The Court said,

"We are not without authority that the general words of this grant do not include an Indian reservation. In Wilcox vs. Jackson, 13 Pet., 498, the President by proclamation had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to

authorize it; but this court held that the act did not apply, and then added, 'we go further and say, that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it.' It may be urged that it was not necessary, in deciding that case, to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. State vs. Delesdenier, 7 Tex., 76; Spaulding vs. Martin, 11 Wis., 274. It applies with more force to Indian, than to military, reservations. The latter are the absolute property of the government; in the former, other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose." (745.)

The law of 1847, therefore, did not authorize the President to reserve from sale the Indian Reserve.

The power conferred on the President by section 2 of the act above mentioned was to make reservation from the sales. The language conferring power on him is found in the exception, viz: "Excepting and reserving from such sales * * * * * * such reservations as the President shall deem necessary for public uses." Clearly no power was conferred on the President to reserve from sale, "until the necessary investigation can be made," lands like the Indian Reserve whose character was fixed as a permanent reservation, and which could not be sold. Nor can it be supposed that the President, in spite of the treaty creating the Indian Reserve, intended to devote the Reserve to the use of Fort Brady.

This proposition is made more clear by reference to the words of the executive order of September 2, 1847 (Comps. Ex. B), heretofore quoted, reserving for the use of Fort Brady, with other lands, section 6, in which the Indian Reserve was included. "Public lands" is the language of the order. Those are the lands to be reserved. Those words have a well known

signification and are used to describe such lands as are subject to sale, and did not include lands reserved and not public. (4).

In Spaulding vs. Martin, the court, by Justice Paine, says:

"The original title to the vast body of wild lands lying in the new states and territories, subject to such rights as are recognized in the Indian tribes, is in the United States. In respect to these lands it has pursued a wise and liberal policy. It has caused them to be surveyed as the advancing tide of settlement required, has disposed of them at small cost to individuals, and has frequently granted large tracts to aid in various public improvements. This has been, and is, well understood to be the purpose for which the government holds these lands. And the phrase 'public lands,' has a well known signification, limited to these only.

But on the other hand, the government of the United States has need of specific portions of land in various parts of the country, usually small tracts, for military or other purposes, necessary for the actual transaction of the business of the government. It has provided by law for the reservation of such tracts. They are known as "reservations," and there is a significance in the word. Reserved from what? Obviously reserved from disposition in the manner and for the purposes for which the general body of the public lands are disposed of. The very necessities of the government with respect to these reservations, take them out of the main body of public lands, and of the policy applicable thereto." (273.)

In Newhall vs. Sanger, the court said:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

On this point Judge Severens says,

"That Congress did not intend by the act of 1847 that it should have any application to the Indian Reservation. That was already withdrawn from sale by a treaty which Congress was bound to respect * * *. The general language of the act and of the President's orders thereunder should be interpreted to be limited to the subject to which they could properly apply." (152 Fed. Rep. 35.) (Rec. 826.)

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NOTE 4—Newhall vs. Sanger, 92 U. S., 761, (1875);
Doolan vs. Carr, 125 U. S., 618, (1887);
Spaulding vs. Martin, 11 Wis., 262, (1860).

## RESERVATION.

The mainland, the patent to which is attacked herein, and over against which islands one and two lie, is the south bank of St. Mary's river for a distance of about 3,000 feet. (Comp. Ex. E.) Against this land there is a fall in the river of about 9 feet. (Rec. 264.) This land is a part of a tract of 36.50 acres, set apart as an Indian Reserve, for the use of Chippewa Indians for encampment for convenience of fishing, under treaty of June 16, 1820. (7 Stat. 206). The same appears as 36.50 acres, "**Indian Reserve,**" part of Section 6, Town 57 N., Range 1 E., as per first United States Survey by Mullet. (Comp. Ex. A.) The Indian right of occupancy was released by treaty August 2, 1855, proclaimed April 24, 1856. (11 Stat. 631-2.) (Rec. 12.) This Indian Reserve was cut in three parcels by the location and survey of the Canal Grant across the same. One of these parcels of land embraced 9.10¾ acres and is the mainland above referred to.

This was located with Porterfield Scrip by Wm. Chandler, May 17, 1881, and patented to him December 15, 1883. (Rec. 165, 180; Compl't. Rec. 14, 15.)

### A. Reservation of April 3, 1847.

The lands in vicinity of the parcel in contention were surveyed in 1845, and this parcel is included within the bounds of Section 6, Town. 47 N., Range 1 E. (See Com. Rec. 7, 8.) Said lands were brought into market under act of Congress March 1st, 1847. (9 Stats. 146.) (Comp. Rec. 8.) Section 2 of this act excepts from sale "such reservations as the President shall deem necessary for public uses." Under this act an Executive order of reservation was made on April 3, 1847, reserving "until the requisite investigation can be had" the north half of fractional Town. 47 North, Range 1 East. (Rec. 137-8.)

### B. Reservation of Sept. 2, 1847.

This reservation covered about one-sixth part of the reservation of April 3, 1847. But it included the business part of the village of Sault Ste. Marie. (Rec. 275, 294-5. See diagram 1.)

RESERVATION

On August 14, 1847, the Secretary of War had asked of Col. Abert of the topographical engineers, a "report upon the quantity of land which it would be expedient to reserve at the River St. Mary's, Michigan." Col. Abert reported,

"I have caused that part of the accompanying plat to be colored red which I would recommend to be reserved from sale.

This will cover all that will be necessary, in my judgment, both for military and other government purposes." (Comp. Ex. B.) (See diagram 1.)

Pursuant to this report of the engineer corps, the Secretary of War, on Aug. 25, 1847, wrote to the Commissioner of the General Land Office enclosing the report of Col. Abert and requested

"that you will cause to be reserved from sale the sections colored in red on the enclosed plat, embracing Sections 4, 5, and 6, of Township 47 North, Range 1 East. And an additional tract adjoining the last named Section on the west not designated by number on the plat." (Comp. Ex. B.)

This last tract was Fractional Sections 1 and 2 of Town. 47 North, Range 1 West.

Thereupon the order of September 2, 1847, was made, reserving from sale Fractional Sections 4, 5, and 6 of Range 1 East, and Fractional Sections 1 and 2 of Range 1 West, of Town. 47 North, "for the use of Fort Brady." (See diagram 1. Comp. Ex. B. and Rec. 139.)

### C. Designation March 10, 1852, or D. C. A. H.

The reservation of September 2, 1847, included the growing and important village of Sault Ste. Marie, and the numerous private claims therein. (Rec. 275, 294-5.) Act Sept. 26, 1850 (9 Stat. 469) was passed providing for the adjustment of the private claims at Sault Ste. Marie and the designation, survey and platting of "lots necessary for military purposes" and "other public purposes" and "the Indian Agency Tract and of the Indian Reserve."

Under this act there was, on March 10, 1852, designated as sufficient "for other public purposes," the north fractional half of Section 1, Range 1 West, and that part of the north

half of fractional Section 6, Range 1 E., lying west of Fort Brady Military Reservation, in Town. 47 North.

This tract was the D. C. A. H. of Complainant's Ex. 15 (Rec. 145-148.) (See diagram 1.) Still there was clamor for further reduction of reservation.

D. **Designation Aug. 5, 1852, or A. E. F. G.**

On August 5, 1852, there was designated "for other public purposes" in lieu of D. C. A. H. of Complainant's Ex. 15, (Rec. 145-148), the parcel A. E. F. G. of Complainant's Ex. "C" attached to the complaint. (See diagram 1.)

The reservations of April 3, 1847, and September 2, 1847, and the designations of March 10, 1852, D. C. A. H., and August 5, 1852, A. E. F. G., each included the parcel of land in contention, within their outer bounds.

## RELEASE FROM RESERVATION.

On August 26, 1852, the Canal Grant Act was passed giving to Michigan, for canal purposes, a four hundred foot strip "through the * * * Military Reservation at the Falls of St. Mary's River." (10 Stat. 35-36.) This grant, as located, took a large part of the Indian Reserve, leaving the remainder in three parcels, one of which is the land patented to Chandler and here in contention. (Comp. Ex. D. See also diagram 1.)

On Dec. 9, 1852, "the requisite investigation" mentioned in order of April 3d, 1847, having been completed and the canal grant having been made, the situation was ripe for permanent adjustment. Thereupon **Order of Release** was made on December 9th, 1852. This order describes certain lands withheld in reservation and then provides that

"all the remaining lands situated in the tracts which were temporarily reserved for 'public use' in the year 1847 (except the Military Reservation at Fort Brady) be, and the same are hereby released from reservation." (Rec. 163.)

The question arises: What does the clause "**except the military reservation at Fort Brady,**" as used in this order of release, mean? **Does it include the land in contention?**

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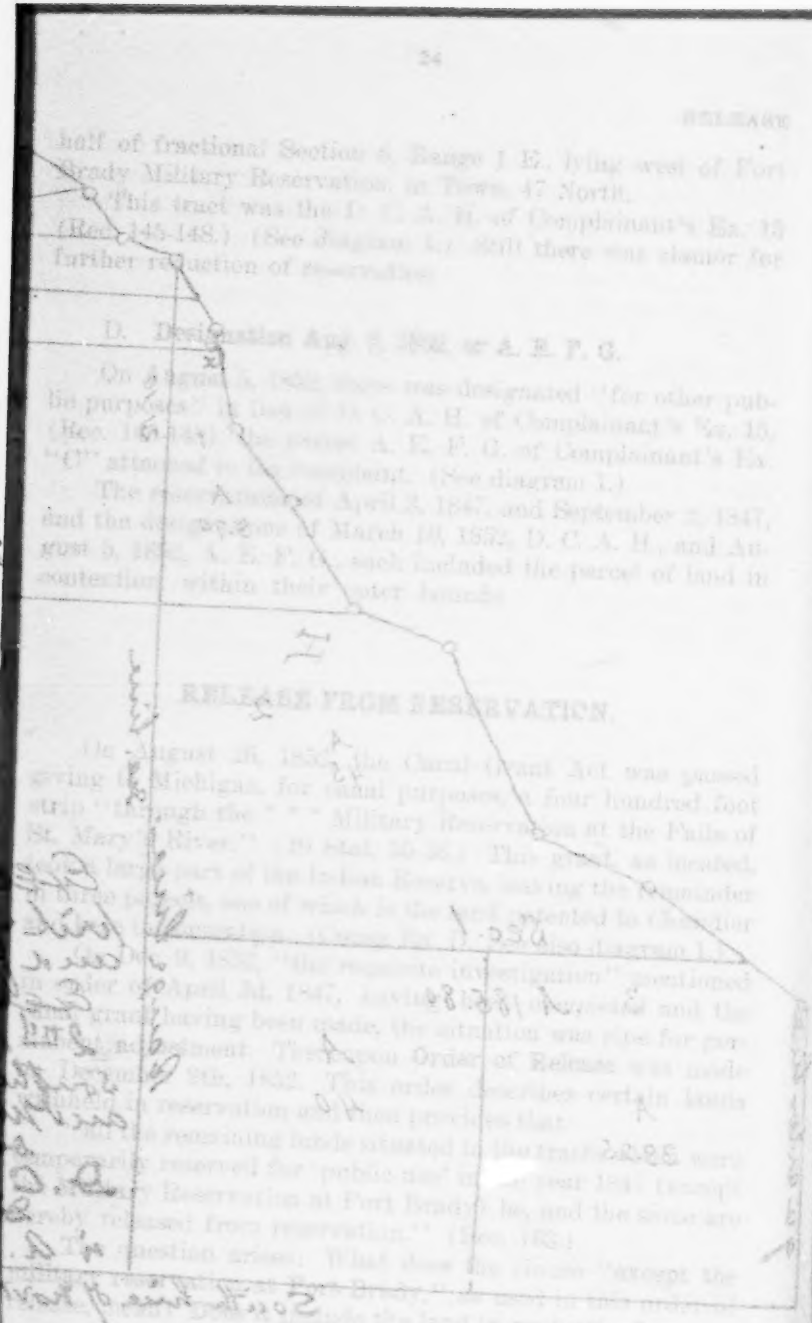

RELEASE

Complainant declares this clause to have meant "either the reservation established by the President's order of September 2, 1847, or the reservation which had been established by the military department of the government under the act of September 26, 1850, as aforesaid, both of which included the land embraced in the so-called Indian Reservation." (Comp. Rec. 12.) In either case it would include the land in contention.

The designation (improperly named reservation by counsel) under act Sept. 26, 1850, (9 Stat. 469) was of the tract A. E. F. G. (See Comp. Exhibit C, Rec. 160, and Comp. diagram 1.)

The question of reservation of the tract in controversy at the time of its location, in 1881, is thus made by complainant to rest, as of course it must, on the meaning of the clause **"except the Military Reservation at Fort Brady."**

So the problem is, did such clause mean **reservation** as per Executive order of **September 2, 1847,** or the **designation** A. E. F. G. of the War Department of **Aug. 5, 1852,** as complainant contends? (Comp. Rec. 10, Ex. "C," Rec. 160) If the clause meant neither of these, then, evidently, as complainant must concede, it meant, as defendant contends, "the Military Reservation at Fort Brady," as per Wescott's survey. In that case, the Executive order of December 9, 1852, released the land in controversy from such reservation as it was under, if any, other than the Indian right of occupancy by treaty.

First. We then inquire, did the clause **"except the Military Reservation at Fort Brady" mean the executive reservation of September 2, 1847?**

(a) The language of the order excludes such interpretation. The order does not relate, as stated in the complaint, (Rec. 12) to "the various tracts which had been temporarily reserved for public use on April 3, 1847," but "the tracts which were temporarily reserved for 'public uses' in the year 1847, ('except, etc."), thus including in the release the lands specified in Order of Sept. 2nd, as well as in Order of April 3rd. (Rec. 163.)

(b) The business part, and nearly the entire residence part, of the city of Sault Ste. Marie lies within the limits of Executive order of reservation of September 2, 1847,—that is, in the north half of Section 6. (Rec. 275-294-5.) If complainant's interpretation of the clause is correct, then the city of Sault Ste. Marie is under Executive reservation.

It is not an anaswer to this suggestion to say that Congress had the power to grant private claims encroaching upon reservations. The act of September 26, 1850 (9 Stat. 469) plainly shows that Congress did not intend that any reservation should be encroached upon by any private claim. The Register and Receiver understood that they were not permitted to, and that they did not, confirm any private claim any part of which so encroached. They said "and in no instance have we confirmed claims, or any portion of the same, within such reservations." (Rec. 666.)

(c) This reservation of 2nd September, 1847, covered fractional secs. 4, 5, and 6, Town. 47 North, Range 1 East, and fractional secs. 1 and 2, Town. 47 North, Range 1 West (Comp. Ex. "B"). John Torrent applied to locate Porterfield Scrip on fractional sec. 2, Town. 47 North, Range 1 West. On appeal, it was held by Commissioner of the General Land Office, Lamoreaux, on full contention and argument, that the clause "**Military Reservation at Fort Brady**" did not refer to reservation by order of September 2, reversing his former decision that it did so refer. (Final Decision of Comr. Lamoreaux on Torrent's appeal.) (Rec. 323-327.)

(d) All, or nearly all, the private claims, the designation and protection of which was the object of act of Sept. 26, 1850, (9 Stat. 469) lay within the limits of this reservation of Sept. 2, 1847. It can hardly be supposed that the executive on Dec. 9th, 1852, intended to leave them still under reservation.

(e) On October 29, 1873, the Commissioner of Indian Affairs wrote to the Secretary of the Interior, recommending

"that the Commissioner of the General Land Office may

be notified that the said reserve (Indian Agency Reserve), the same being a part of Section 5, Town. 47 North, Range 1 E., is no longer needed for Indian purposes, to the end that the reserve may be disposed of according to law under the rules and regulations of the General Land Office." (Rec. 741, 2.)

The Secretary of the Interior approved of this suggestion on the 30th of October, and on the 18th of November, 1873, the Commissioner of the General Land Office wrote the Register and Receiver at Marquette, Michigan, directing him to offer the lands for sale, saying,

"The tracts to be disposed of are in Section 5, T. 47 N., R. 1 E., and are designated on the plat herewith inclosed and marked as first part Indian Agency Reservation, area 7.23 acres, and second part Indian Agency Reservation, area 19.10 acres." (Rec. 742.)

Thereupon such proceedings were had that the Indian Agency Reserve was sold according to Whelpley's survey and patent made of same to James P. Pendill. (Rec. 328-9.) (Whelpley's map, Compt. Ex. E.) (Ex. 23, Rec. 392-3.)

This is part of the land covered by Ex. order September 2, 1847.

(f) Further. All argument to point that "except the Military Reservation at Fort Brady" did not mean the A. E. F. G. designated by the War Department on August 5, 1852, is equally applicable to point that it did not mean the reservation of September 2, 1847.

Second. On the one hand, the complainant contends that the clause "except the Military Reservation at Fort Brady" meant the Military Reservation proper at Fort Brady, substantially as surveyed by Westcott, and in addition thereto the tract A. E. F. G. designated by the War Department as necessary for "other purposes than military" on August 3, 1852. (Exhibit C, of Comp'ts' bill. Rec. 160.) On the other hand, the defendant claims that this clause "except the Military Reservation at Fort Brady" meant the Fort Brady Mili-

tary Reservation proper as surveyed by Westcott in 1846. (Rec. 196-7-8.) Which contention is correct?

No doubt will remain respecting the meaning of the clause "Military Reservation at Fort Brady" if we give careful attention to the history of the dealings of the various departments with this "Military Reservation at Fort Brady" and the reservations in the vicinity of Fort Brady for other public purposes than military. There are many documents in divers departments respecting this matter. Not all are entirely consistent. Inaccurate expressions sometimes occur. But a patient examination removes all confusion and doubt.

There are many expressions in many documents, notably those relating to the McKnight Railroad, and the Canal Grant Act, of August 26, 1852, (10 Stat. 35), wherein the reserved lands at the Falls of St. Mary's River are spoken of as "the Military Reserve" and "the Military Reservation," and the "Military Reserve at Sault Ste. Marie" and "Military Reservation near Fort Brady," and "Military Reserve at this place." (Rec. 749, 752, 754, 756.)

At an early day, and before Wescott's survey, the question of Reservation at this place was very much in the air. The views respecting it were very indefinite. Wescott himself spoke of it in a letter to Lieut. Woodbridge at Detroit, dated August 18, 1846, thus, "all of which within four miles square is alleged to be a military reserve." (Rec. 756.) He further adds that some contend "that no military reserve exists or has ever been made." (Rec. 746.) But we find only one instance of the use of the expression "the Military Reservation at," of, or for "Fort Brady" in reference to any other property than the Fort Brady reservation as surveyed by Wescott in 1846. Such one use is in the letter of the Commissioner of the General Land Office to the Register and Receiver of the 9th of June, 1853. (Rec. 741.) Respecting this see later herein.

Act Congress, Sept. 26, 1850 (9 Stat. 469), used the words "the position and the extent of lots necessary for military purposes, as also the position and the extent of any other lot or lots, which may be required for other public purposes." This plainly distinguishes between "Military purposes" and "other public purposes." This distinction was kept in mind by all officers from the passage of this act to the last official

act growing out of its execution, one of which acts was the order of release of Dec. 9th, 1852. (5.)

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NOTE 5—Letter Com'r G. L. O. to R. & R., Aug. 14, 1851 (Rec. 139-0).
Com'r G. L. O. to Sec'y War, Aug. 14, 1851 (Rec. 146);
Col. Abert to Sec'y War, Sep. 12, 1851 (Rec. 147-8);
Q. M. G. to Sec'y War, Jan. 27, 1852 (Rec. 14);
Sec'y War to Comr. G. L. O., March 10, 1852 (Rec. 146);
Com'r G. L. O. to Sec'y Int., April 29, 1852 (Rec. 150-1);
Sec'y Int .to Sec'y War, May 7, 1852 (Rec. 151);
"The Military and other public reservations proposed."
Com'r G. L. O. to Sec'y Int., April 30, 1852 (Rec. 740);
Col. Abert to Sec'y War, May 11, 1852 (Rec. 153);
"The Fort Brady or Military Reserve * * * Reservation for canal and other purposes."
Sec'y War to Sec'y Int., May 25, 1852 (Rec. 152);
"For Military and other public purposes."
Col. Abert to Sec'y War, June 17, 1852 (Rec. 154);
Col. Abert to Sec'y War, June 21, 1852 (Rec. 155);
Com'r G. L. O. to Sec'y Int. (Rec. 156);
"The extent of the Military reservation at Fort Brady."
Com'r G. L. O. to Reg. & Rec., Oct. 21, 1852 (Rec 309-0);
Com'r G. L. O. to Sec'y Int., Dec. 2, 1852 (Rec. 161);
Com'r G. L. O. to Sec'y Int., Dec. 2, 1852 (Rec. 311);
Sec'y Int. to Sec'y War, Feb. 7, 1853 (Rec. 313);
R. & R. to Com'r G. L. O., April 4, 1853. Report on private claims (Rec. 666);
Col. Abert to Sec'y War, Feb. 10, 1853 (Rec. 157-8);
"To the end that the western limit of the Fort Brady reservation be made to coincide with the line a b c d of the land office map." (Exhibit C to Compt's Bill).
Com'r G. L. O. to R. & R., Feb. 15, 1853 (Rec. 158-9);
R. & R. to Com'r G. L. O., March 12, 1855 (Rec. 757-8).

Also note one semi-official document, the letter of Conger and others to the General Land Office. This letter started the official action to reduce the extent of reservation to actual needs. (Rec. 148-9.) In his opinion herein Judge Severens gives prominent place to this document as proof of the then "Common understanding of what was considered as the 'Military Reservation at Fort Brady.'" (152 Fed. 33-4.)

"The Military Reservation at Fort Brady" meant the Military Reservation proper, substantially as surveyed by Wescott in 1846.

(a) The language of the clause is "except the Military Reservation at Fort Brady." All else is released. **"The Military Reservation at Fort Brady"** was well defined from 1845 to 1875. In 1845, when ordinary United States Survey was made by Mullett, it was marked only by some indefinite lines of actual occupation. On the plat of United States Survey was then shown "Indian Reserve," "Reservation Fort Brady" and "Methodist Missionary Reserve." The outer bounds of "Indian Reserve" and "Methodist Missionary Reserve" were fixed by Mullet. But outer bounds of "Reservation Fort Brady" were not fixed. (Comp. Ex. A.) (Rec. 92-3, 744, 5, 6, 197.)

Soon after ordinary survey of 1845, it became desirable, on account of the crowding in of settlements and private claims, to have the limits of "the Military Reservation at Fort Brady" more sharply defined. Hence, on October 3, 1846, the Secretary of War wrote to the Adjutant General, saying,

"The Limits of the Lands occupied for military purposes adjacent to Fort Brady, not having been defined by actual survey and reservation, questions of title have arisen with regard to them, and a suit has been brought against an officer of the Army for asserting the claim of the Department by removing fences erected thereon. * * * * * These limits when determined on, will be reported by this Department to the President for reservation, and the remainder, if any, of the tract now on military occupation, will be relinquished." (Rec. 198.)

On October 6, 1846, Adjutant General Jones directed Gen. Brady to report on the subject, (Rec. 305, 6), and on Dec. 11, 1846, Gen. Brady reported to Gen. Jones with Wescott's map,

fixing the exact limits of Fort Brady Military Reservation. (See diagram 1.) He said,

"This he has done so correctly that Mr. Lyon, the Surveyor General, has, from it, been able to trace on the map you sent me what you desired me to do." (Brady to Jones, Dec. 11, 1846. Rec. 197.)

By use of this map, Surveyor General Lyon laid down this survey of Fort Brady Military Reservation on the plat of ordinary United States Survey, and requested the General Land Office "to make the corresponding alterations on the plat in (his) your office." (Letter June 9, 1847, and plat.) (Comp. Ex. A, and Deft's Ex. 3, and Rec. 308.)

This military reservation embraced 29½ acres as per Wescott's Survey (Comp. Ex. 36. Rec. 197, 198), and 31.65 acres as per Whelpley's Survey (Comp. Ex. E), and "about thirty acres" as per War Department's History of Fort Brady (Rec. 307), and 29.80 acres as per Public Land Commission (Report Vol. II, p. 1127). It was distant nearly a quarter of a mile from the Indian Reserve. (Whelpley's map and field notes. Rec. 390.) (Wescott's map and field notes. Comp. Ex. A.) (See diagram 1.)

(b) **A History of Fort Brady**, found in War Department, evidently written after March 3, 1875, says,

"By executive order December 9, 1852, which declared certain light house reservations, all the remaining lands situated in the tracts, which were temporarily reserved for 'public use' in the year 1847, except **the military reservation at Fort Brady with an area of about thirty acres**, were restored to the public domain." (Rec. 307.)

(c) "Fort Brady.—Included within a reservation originally made April 3, 1847, or north half of township 47 N., range 1 E. Present reserve is in sections 5 and 6 of that township, and its limits were designated by the War Department, under act of Congress approved September 26, 1850 (No. 517, sec. 2). It contained an area of 29.80 acres. By act of Congress approved March 3, 1875 (No. 586), one and twenty-six hundredths acres were granted for school purposes, and

certain streets were established. Exact area of reservation remaining, not known."

(Report of Public Land Commission, Dec. 1st, 1880-1. Local and Temporary, Vol. 11, p. 1177. 46th Congress, 3rd Ses., Ex. Doc. 47, p. 13.)

(d) On February 26, 1853, the Commissioner of the General Land Office wrote to the Register and Receiver at Sault Ste. Marie calling attention to the order of December 9, 1852, and saying in a P. S., "You will perceive that the President's order releases all the balance of the reservation of 1847 (except the existing reserve for Fort Brady) and you will so note them in your tract books and plats." (Rec. 711.)

(e) The A. E. F. G. of the War Department is shown on Exhibit "C" of Comp'ts Bill. It is distant at nearest point about 600 feet from the Fort Brady tract. It includes the Indian Reserve, the Canal Grant, and some other lands. The south line of the Canal Grant is substantially coincident with its south line, from west end to angle at F, whence it continues in a straight line to the river below, cutting the Indian Reservation into three parts, one being south and two north of same. (Testimony of Ripley. Rec. 237.) (Exhibits "A," "C," "D," "E.") (Diagram 1.)

It leaves to north of it part of the Executive reservation of June 10, 1882. The whole or parts of private claims 41, 50, 65 to 78 inclusive, 83 and 84, together with the docks of Sault Ste. Marie below the Rapids, lie north of the line A E F, and between it and the south line of the canal lands. (See Exhibits C, D and E of Compl'ts Bill. C same as complainant's exhibit 18. Rec. 152-156. Ripley's testimony, Rec. 237, Deft's Ex. 9, Rec. 321-2, Diagram 1.)

The report of Col. Abert, wherein this tract A. E. F. G. is first defined, shows that it was no longer regarded as having any relation to "the Military Reservation at Fort Brady." Col. Abert says, "Second. I repeat the former recommendation, that the western line of the Fort Brady Reservation be the line a. b. c. d." (Rec. 154.) See the a. b. c. d. on the Abert map, Complainant's Exhibit C.

RELEASE

(f) This designation A. E. F. G. had come about thus: On March 10, 1852, the Secretary of War designated under said act as "the position and extent of lots necessary for military purposes, and also the position and extent of any other lot or lots which may be required for other public purposes," Fort Brady Military Reservation as per Wescott's survey and the land bounded on the east by same, (line D. C.), south by east and west quarter line of section 6 and 1 (line C. A. H.), and north and west by St. Mary's River. (See letter Secretary of War, March 10, Rec. 146, and map Compts. Ex. 15.) (See diagram 1.)

This designation was based on the report of Col. Abert of September 12, 1851, to Secretary of War, saying,

"**For military purposes, the present military reservation may be considered ample. But as a canal is contemplated in that quarter,** is necessary, and will have to be made, it is a question whether it may not be advisable to abstain from sales, until the canal be located. I have put upon the Land Office Survey the probable trace of the canal * * * * * Nearly all of the ground, west of the line C. D. and north of the line C. A. H. (Land Office Survey) will probably be found involved in settlements and pre-emption claims, and it is respectfully recommended that in addition to the military reservation, all the lands between the red line C. A. H. and the river, of the Land Office Survey, should for the present be reserved from sale." (Rec. 14.) (See diagram 1.)

The tract D. C. A. H. **designated March 10, 1852,** embraced a large part of the business portion of the Village of Sault Ste. Marie, and on April 2, 1852, (Rec. 148-9), the **citizens remonstrated** and Conger, Penniman, Cass and Felch concurred, conditioned only, "that the lands required for the **contemplated canal** shall not be interfered with."

On April 30, 1852, the Commissioner of the General Land Office wrote to the Secretary of the Interior respecting the remonstrances of the citizens, concurred in by Cass, Felch, Stuart and others, saying,

"The accompanying memorials signed by the Honorable Messrs. Cass, Felch, Stuart and others, which have been referred to this office for report, represent the importance of throwing into market such portions of those reserved lands as are now found not to be permanently needed for public uses.

This office is of the opinion that the time has arrived when the reservations alluded to may be circumstribed within the limits of public utility for Light House, Military, Naval or other public purposes. If such opinion is concurred in by the proper authorities, and in order to facilitate action in the premises, diagrams exhibiting the bodies of land so reserved are herewith submitted and after the Treasury, War, Navy and Interior Departments shall have designated all the permanent sites and circumjacent areas of land needed for Light House, Military, Naval and Indian purposes, the residue may be ordered by the Executive to be brought into market as desired by the Memorialists." (Rec. 740.)

Evidently the Secretary of the Interior concurred; and thereupon the General Land Office referred the matter back to the Secretary of War; and the Secretary of War called on Col. Abert for further information as to the reduction of the reserve for military and other purposes, and on June 17, 1852, Col. Abert reported:

"First: That the space tinted blue, and marked by the letters A. E. F. G., be reserved from sale. This reservation is intended to free from all embarrassment the space required for the future location of the canal.

Second: I repeat the former recommendations, that the western line of the Fort Brady Reservation be the line a, b, c, d." (Rec. 154.)

On June 21, 1852, Col. Abert further reported,

"In the map submitted to the consideration of the War Department, with a report from this office of the 17th instant, there is marked upon,

First: The position and extent of lots for military purposes, as far as the same can now be designated.

Second: The position and extent of other lots for other public purposes. **The only other public purposes known to this office,** for which land should be reserved, are the probable wants of the **contemplated canal;** for these purposes ample space is reserved and marked on the map which it attached to the reports from this office of the 17th instant." (Compts. Ex. "C.") (Rec. 155.)

Thereupon on August 5, 1852, the War Department sent to the General Land Office the map, Exhibit "C," saying,

"Agreeably to your request I have reconsidered the ac-

tion of this Department, communicated to you on the 10th day of March last as to the extent of the Military Reserve at Fort Brady. * * * * * * * I shall be guided by this opinion. And accordingly recommend that all the vacant space around the fort included within the given limits X. Y. Z. O. be retained. * * * * * *

As regards the **reserves for other purposes** than military, I refer you to the report of the Chief of the Topographical Bureau and map." (See Compt. Exhibit "C" for tract A. E. F. G.) (Also diagram 1.)

(g) All this work was not by way of, or preparatory to, reservation, as Sections 4, 5 and 6, were all then, if ever, under reservation by Executive order September 2, 1847, unless such reservation was abrogated by Act September 26, 1850. (9 Stat. 469.)

The action of War Department March 10 and September 2, 1852, was **not reservation, but designation** under Section 2, Act September 26, 1850, (9 Stat. 469), requiring "the Secretary of War to direct the proper military officer * * to designate or cause to be designated * * the position and the extent of lots necessary for military purposes, as also the position and extent of any lot or lots which may be required for other public purposes" than military. It was **preparatory to release from reservation** under pressure from settlers, and private claimants.

In all these documents, it plainly appears that the **"Military Reservation at (for or of) Fort Brady"** meant the tract of about thirty acres around and including Fort Brady as surveyed by Wescott; and not the tract A. E. F. G. which was, by all officials, including the War Department, designated as desirable "for other public purposes," that is, "Canal purposes," **the only other known "public purpose."**

(h) **Canal Reserve.**

On Aug. 26, 1852, (11 Stat. 35), Congress granted to Michigan for **canal purposes a four hundred foot strip** to be located "through the public lands known as the military reservation at the Falls of St. Mary's River." By "Military Reservation" as used in this act, complainant says Congress meant "the

reservation 'for other public purposes' designated by the Military Department." (Rec. 11.)

In Spalding vs. Chandler (160 U. S. 394 at 398), Mr. Justice White says the Village of Sault Ste. Marie "included within its boundaries the **military reserve of Fort Brady and the Indian Reserve.** * * * * * * and the Commissioner advised the Register and Receiver that the Secretary of War approved of the Wescott Survey as the true limits of the military reservation." * * * * (399.) "The Military Reserve noted on the Whelpley map lay outside of and to the east of the Indian Reserve." "The land actually appropriated for the then use of Fort Brady was located considerably to the east of the Indian Reserve, and private settlements were made upon the intervening lands." (P. 405.)

True, the Canal Grant act gave the right of locating a canal "through the public lands known as the Military reservation at the Falls of St. Mary's River." The land referred to was, no doubt, outside the Fort Brady Military Reservation and inside A. E. F. G. and the designation Military Reservation was evidently a misnomer, as supposed by Mr. Justice White. (See Spalding vs. Chandler at page 406.) As Mr. Justice White says,

"It is true that the act of August 26, 1852, c. 92 (10 Stat. 35), which granted to the State of Michigan the right of locating a canal through the public lands, known as the military reservation at the Falls at St. Mary's River, in said State, authorized, by such description, the location of the canal mainly across and through the Indian Reserve. It seems probable that the bill in question was drafted after consultation with, and the approval of, the War Department, the officials of which department had, in 1847, sought the reservation by the President of lands at Sault Ste. Marie, in the belief that a canal was not a far distant possibility; and the designation of the land in question, as the military reservation, may properly be ascribed to that source."

The Whelpley map (Comp. Ex. "E" or 23) shows how the Indian Reserve was cut into three parcels by the Canal Grant and its location. (See diagram 1.)

(i) **On December 9, 1852,** the situation was this: The Military Reservation at Fort Brady, as per Wescott's survey,

had been approved and held sufficient by the War Department. The Canal Grant had been legislated, and located by survey within the boundaries of A. E. F. G., the tract designated as sufficient for "other public purposes," (Rec. 666), though the location had not been approved. Neither the Land Department nor the War Department knew of any other public purposes for which reservations were desirable at this point. (Rec. 155-6.) (Comp. Ex. "C.")

Private claimants and settlers were clamoring, and the citizens of Sault Ste. Marie were anxious to have all lands, not desired for public use, put to a commercial and residence use, for the common good. (Letter of Conger and others, Rec. 148-9.)

The Commissioner of the General Land Office, moved by the remonstrances of the citizens, had said to the Secretary of the Interior.

"This office is of the opinion that the time has arrived when the reservations alluded to may be circumscribed within the limits of public utility for Light House, Military, Naval or other public purposes. If such opinion is concurred in by the proper authorities, and in order to facilitate action in the premises, diagrams exhibiting the bodies of land so reserved are herewith submitted and after the Treasury, War, Navy and Interior Departments shall have designated all the permanent sites and circumjacent areas of land needed for Light House, Military, Naval and Indian Purposes, the residue may be ordered by the Executive to be brought into market." (Rec. 740.)

Under such conditions, there came about the Executive order of December 9, 1852, releasing from reservation all the lands covered by reservations of 1847, excepting certain lands specifically described, and excepting **"the Military Reservation at Fort Brady."** (Rec. 163.)

Thereupon the Commissioner of the General Land Office wrote the Register and Receiver on February 26, 1853, giving his interpretation of this order, saying,

"P. S. You will perceive that the President's order releases all the balance of the reservation of 1847 (except the existing reserve for Fort Brady) and you will so note them in your tract books and plats." (Rec. 311-2.)

(j) If the tract A. E. F. G. was included within the exception "except the Military Reservation at Fort Brady," in the Executive Order of release of December 9, 1852, then the boundaries of this parcel A. E. F. G. should have been run and marked and exhibited on his plat by Surveyor Whelpley, pursuant to Section 7 of act of September 26, 1850, requiring him to designate "the lots reserved for Military or other purposes, according to the extent and limits of the same." (9 Stat. 471.) On the contrary, he did not survey or mark any such boundaries, or show any such reserve in his plan. On the contrary, he surveyed and subdivided and represented on his map the land comprising the tract A. E. F. G. on the basis that it had been released from reservation, except so far as included in the canal strip. His survey and map were approved by the Register and Receiver, the Surveyor General and the General Land Office.

Can we doubt that the excepted parcel "**the Military Reservation at Fort Brady**" meant the Reserve substantially as per Wescott's survey? The "other public purposes," "canal purposes," were provided for by the Canal Grant, the boundaries of which, if not then certain, could be made certain by approval of the survey already made, or resurvey and approval. No other public uses or purposes were then known.

To say that "the Military Reservation at Fort Brady" meant not the Military Reservation at Fort Brady, but such Military reservation and also, in addition thereto, a parcel of land distinct, separate and distant from the same, reserved for canal purposes, the only other public purpose known, reminds us of the epitaph of Mary Brown:

"The last remains of Mary Jones
Lie buried underneath these stones.
Her name was Brown. The name of Jones
Is used because it rhymes with stones."

Third. **Contemporaneous Official Interpretation.**

The clause "except the Military Reservation at Fort Brady" was interpreted by the **Register** and **Receiver** as releasing all of A. E. F. G. except the Canal Strip. See confirmation of private claims Nos. 3, 4, 5, 95, and 96. (Rec. 315-6.) Also approval of entry by Chandler, which included part of A. E. F. G. (Rec. 167, 170.)

RELEASE

Also recommendation Register and Receiver, March 12, 1855, "that right of way for railroad" be granted to the Chippewa Portage Company "from their dock on the west line of the Military Reserve at Fort Brady running along Water Street * * * to the east side of the Indian Reserve." (Rec. 758.)

Also see report of Register and Receiver regarding confirmation of private claims, dated April 4, 1853. (Rec. 666.) Therein the Register and Receiver say,

"In accordance with the second section of said act and the instructions, the Military Reservation of Fort Brady, according to 'Wescott's Survey' so called, the Indian Reserve and Indian Agency Reserve and the Ste. Marie Canal Reservation of four hundred feet in width, as located by Capt. Canfield on the 14th day of October, 1852, acting under authority from the Governor of Michigan, have been designated on the plat of the public survey of said village accompanying our abstracts, and our adjudications have been confined strictly to claims outside of said Reservations; and in no instance have we confirmed claims, or any portion of the same, within said Reservations."

Also confirmation of Alva Cable's claim, No. 131, gives as a boundary "the west side of the Military Reserve at Fort Brady." (Rec. 319, 495.)

Also see approval of Whelpley's Survey and Map.

Also by Special Deputy Surveyor Whelpley. (Ante .)

It was also so construed by the **General Land Office.**

See letter General Land Office to Secretary of the Interior, February 7, 1853. (Rec. 313.)

See letter General Land Office to Register and Receiver, February 15, 1853. (Rec. 158-9.)

Also General Land Office to Register and Receiver, February 26, 1853 (Rec. 311-2), to which letter postscript is added referring to such Executive order as follows:

"You will perceive that the President's Order releases all the balance of the reservation of 1847 (except the existing reserve for Fort Brady) and you will so note them in your tract books and plats."

Also letter General Land Office to Register and Receiver, October 13, 1881. (Rec. 171-2.) Also affirmation by Commissioner of the confirmation by the Register and Receiver of private claims Nos. 3, 4, 5, 95, and 96 (Deft. Ex. 8, Rec. 315.). Also

by patent of said private claims, and vacant lot No. 3 (Deft. Ex. 7, Rec. 313-4), and the Chandler parcel herein involved by the United States. These parcels, together with Executive reservations of June 10, 1882, and May 18, 1885, include all of the tract A. E. F. G.

Also approval Whelpley's Survey and Map.

Also by the **Surveyor General.** See his approval of Whelpley's Survey and Map.

Also by **Interior Department.**

See letter Secretary of the Interior to General Land Office, June 8, 1883. (Rec. 176-7-8.) Therein Secretary Teller says to the Commissioner of the General Land Office, after reciting the treaty of 1820 and folowing treaties, including the treaty of 1855 surrendering the right of fishing, and the passage of the act of Sept. 26, 1850:

"When released by the treaty of August 2, 1855, aforesaid, it became public land and was not subject to sale under the provisions of said act of September 26, 1850. * * * * The tract in question having in this manner become public land surveyed and not otherwise appropriated, it was subject to location by Porterfield Scrip at the time such location was made."

The reservation for the use of St. Mary's canal (reservation of June 28, 1881) was made some time after the scrip location, and was therefore subject to such location. (Rec. 178.)

See attempted reservation June 28, 1881. (Rec. 180-1-183.)

By the **Executive Department.**

See orders of reservation of June 10, 1882 (Rec. 321-2), (Deft. Ex. 9), and May 8, 1885 (Rec. 312-3.)

By **War Department.**

See requests for above orders of reservation. (Rec. 785-6-7, Comp. Ex. 70.)

Also Chief of Engineers to Secretary of War, October 10, 1888. (Rec. 791.)

Secretary of War to Secretary of Interior, October 12, 1888. (Rec. 792.)

RELEASE

Secretary of War to President, October 12, 1888. (Rec. 792.)

See Secretary of War to Secretary of Interior, February 14, 1853. (Rec. 158.)

Chief of Engineers to Secretary of War, February 12, 1883. Rec. 186.)

Abert to Secretary of War, February 10, 1853. (Rec. 157-8.)

Also by **Congress.** See act March 3, 1875. (18 Stat. 519.)

It is therein enacted,

"That a certain portion of the Military Reservation of Fort Brady * * * * * containing 1.26 acres and bounded on the north by Portage Street, on the east by Church Street, on the south by Ridge Street, and on the west by the west line of said Military Reservation, be and the same is hereby donated to school district No. 1."

The "west line of said Military Reservation" appears plainly to be the west line of the Military Reservation at Fort Brady, according to Wescott's survey.

**Contra.**

First. On June 9th, 1853, the Com'r G. L. O. wrote a letter to the Reg. and Rec. which indicates that the Com'r gave to the Order of Release the interpretation contended for by complainant.

This might be evidence to the point, if it were not for the fact that it proves too much.

It asserts the Executive reservation of the 2nd of September, 1847, as then in force; and that "Sects. 4, 5, and 6, of T. 47 N., R. 1 E., Sects. 1 and 2 of T. 47 North, R. 1 West," still remain under reservation (Rec. 741).

Plainly this was an error of the Commissioner of the General Land Office or of some clerk who wrote, or furnished the material for, this letter; because these lands covered more than all the city of Sault Ste. Marie (Rec. 275, 294-5).

Respecting this letter, see also answer of R. & R. to same as per Spaulding vs. Chandler, 84 Mich., 140 at 142.

In respect to this letter, Judge Severens said,

"Counsel for appellant, however, point to an exception. This consists of a letter written by the Commissioner of the Land Office, Wilson, to the register and receiver of the district, June 9, 1853, in which the Commissioner made it apparent that he considered the reservation of the 2nd of September, 1847, still in force.

But in the letter of February 26, 1853, the same Commissioner had, as above stated, informed them that the President's order had released all the balance of the reservation of 1847 except the existing reserve for Ft. Brady and directed them to so note them in their tract books and plats." (152 Fed. Rep. 35-6.)

In his report to the Secretary of War, May 11, 1852, Col. Abert said,

"1st. That the western line of the Fort Brady Reservation should coincide with the marked line a. b. c. d. upon the map No. 2 (II) from the Land Office. * * * * *

2nd. That the reservation for canal and other purposes should be north of the line E. F. G." (Rec. 153.)

Then there was call through the Conger-Penniman letter for further reduction of reservation; and on 17th of June, 1852, Col. Abert again reported,

"1st. That the space tinted blue and marked by tthe letters A. E. F. G. be reserved from sale. This reservation is intended to free from all embarrassment the space required for the future location of the canal.

2nd. I repeat the former recommendation that the western line of the Fort Brady Reservation be the line a. b. c. d. * *

I again repeat the recommendation that the western boundary of the Fort Brady Reservation as now recommended, on the line a. b. c. d. be marked without delay by a post and wire fence."

The line a. b. c. d. referred to in both these reports coincides substantially with the western boundary of the Fort Brady reservation as surveyed by Westcott. (Comp's Ex. 18, 20, Ex. "C" of Compt.)

The exact location of the lines bounding the Fort Brady reservation as surveyed by Westcott was for a time not well settled. There was correspondence respecting it early in 1853 (Rec. 156-7-8-9). On February 7, 1853, the Comr. G. L. O.

writes to Sec'y Int. "relative to the extent of the military reservation at Fort Brady" (Rec. 156). This is the exact language we are seeking to interpret. It was used by the Comr. G. L. O. within sixty days after the Executive order of release. A reading of this letter and a report on the same by Col. Abert, Feb. 10, 1853 (Rec. 157-8), and instructions by Comr. G. L. O. to Reg. and Rec. pursuant thereto on February 15, 1853 (158-9), together with an examination of complainant's Exhibit 18 must convince the reader that the Sec'y Int., Comr. G. L. O., Sec'y of War, and Col. of Topographical Engineers interpreted "the military reservation at Fort Brady" to mean Fort Brady reservation as surveyed by Wescott.

Second. On May 7, 1852, the Secretary of the Interior wrote to the Secretary of War inquiring what portion of said tracts would be needed by the War Department. To this the Secretary of War replied on May 25, 1852, that no reservation would be required by his department within the region embraced by the maps submitted "except that at Fort Brady." (Rec. 151. )It is claimed that by this the Secretary of War clearly meant both the reservation for the military post and the neighboring reservation for public uses.

If by the words "except that at Fort Brady," the Secretary of War referred to the reservations in the vicinity of Fort Brady, it does not follow that the words "except that at Fort Brady" in this letter of May 25, 1852, meant the same as the words "the Military Reservation at Fort Brady," in the order of release December 9, 1852.

That they do not bear the same interpretation is apparent. To this effect note

(a) In his letter of May 7 to the Secretary of War, the Secretary of the Interior asked for a reduction of the area of reservation. To that end, he asks for a review "respecting the **military and other public reservations,**" plainly showing that the other reservations were not classed as **military**.

(b) The Secretary of War referred the letter of the Secretary of the Interior to the Bureau of Topographical Engineers, which bureau answered on May 11 (Rec. 153),

"These papers desire first a modification of the western line of what is usually denominated the Fort Brady or **mili-**

tary reserve, and second, a modification of the reserve, west of that line involving the Canal and railroad tract."

This still further shows that the term "military" was not applied to the Canal reserve.

(c) Col. Abert, the Topographical Engineer, further details,

1st. A modification which may be made in the western line of the Fort Brady reservation.

2nd. That the "reservation for canal and other purposes, should be north of the line E F G (probably A E F G).

3rd. * * In order to be more definitely understood, I have had the spaces so reserved, marked with a blue color upon the map No. 2, from the Land Office." (See Rec. pages 151-2-3 and Exhibit C attached to the complaint, being map No. 2 (II.)

Third. Counsel for complainant also relies upon proclamation for sale, 18th of May, 1853 (Rec. 797-801). This proclamation also proves too much. It omits Sects. 4, 5 and 6, T. 47 N., R. 1 E.

If there was no other cause of omission than the reservation of the tract A E F G, and the omission was only of such parcels as were cut into by such tract, then this evidence would be of some force. But the fact is that, in 1853, a large part of sections 4, 5 and 6 were under the burden of private claims, which then, and for long time theretofore, had existed, and which had been allowed by Congress, though not definitely located. This fact accounts for the omission of these sections from the proclamation of sale.

Further, Sections 4, 5 and the south half of section 6 were not withheld from sale on account of reservation, because A. E. F. G. did not touch any part of either of them.

Further, the Canal Grant cut into, and forbade the sale of, every subdivision of land cut into by tract A. E. F. G. (See diagram 1.)

The letter of Comr. G. L. O. to Sec'y of Int., May 4th, 1857, says that the lands released by Order Dec. 9th, 1852, were proclaimed to be "offered at public sale to commence on Monday, September 5, 1853." (Rec. 796.) This letter is a very general statement. It does not descend to particulars. It also proves

too much. As said before, Secs. 4, 5 and 6 included private claims which had not, in 1853, been survyed. Hence the necessity of omitting from sale all of such sections.

Do not the foregoing facts show conclusively that Executive order of December 9, 1852, released from reservation of Executive order of September 2, 1847, all "except the Military Reservation at Fort Brady," as surveyed by Wescott?

Otherwise what has become of all the action of the General Land Office, Interior Department, and War Department, in their attempts to narrow the limits of reservation at Sault Ste. Marie, pursuant to demands of settlement urged on the General Land Office by the letter of Conger, Penniman, and others? Does that all stand for naught?

## Act of Congress.

But if above is not the proper interpretation of the order of release of December 9, 1852, then we claim that act of Congress, Aug. 26, 1850 (9 Stat. 469), for settlement of private claims, and official action in execution thereof, including the making of the Whelpley Map, the approval of the same by the Surveyor General, and by the Commissioner of the General Land Office, and placing the same on file in the General Land Office, all abrogated the Executive orders of reservation of April 3 and September 2, 1847. Especially so as to the Indian Reserve, to which such Executive orders of reservation certainly could not have attached, and become operative, until the ratification of the treaty of Aug. 2, 1855, which was on April 24, 1856 (11 Stat. 631-2), after the making of said surveys and the approval of the same and the filing of said map.

To that effect is the final decision of Commissioner Lamoreaux of the General Land Office in the Torrent case. Therein he says, after reviewing the entire matter and reversing his former decision,

"I am of the opinion that it" (the action of the War Department fixing the boundaries of the Fort Brady Military Reservation) "had the effect of restoring the **balance of the land** described in the Executive orders of April 3 and September 2, 1847, to the public domain; and that no further order of the Executive was necessary to complete the restoration." (Rec. 325.)

The uncontradicted proofs show action of the various departments, after the Executive order of release of December 9, 1852, dealing with **every square foot of tract A E F G** outside of the canal lands on basis that same was no longer under reservation.

Ryan vs. Brown proceeded upon ownership by Ryan of the riparian part of private claims 76 and 77, land within the tract A E F G, covering part of the St. Mary's docks below the canal. (18 Mich. 196.)

Scranton vs. Wheeler proceeded upon the ownership by Scranton of the riparian part of private claim 3, land within the tract A E F G. (179 U. S. 141.)

Former case defended by State of Michigan. Latter case defended by United States under special charge of War Department.

Value of **Contemporaneous Official Interpretation.**

"The weight of contemporaneous and long continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt." (6.)

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NOTE 6—United States vs. Sweet, 189 U. S., 471 at 473 (1903);
United States vs. Johnston, 124 U. S., 236 at 253 (1888);
United States vs. Finnell, 185 U. S., 236 at 244 (1902);
Brown vs. Clements, 44 U. S., 650 at 670 (1845);
Gazzam vs. Phillips, 61 U. S., 372 (1857);
United States vs. Hancock, 133 U. S., 193 at 197 (1890);
Edwards vs. Darby, 25 U. S., 206 at 210 (1827);
Peabody vs. Stark, 83 U. S., 240, 243 (1872);
United States vs. Pugh, 99 U. S., 265 at 269 (1878);
Brown vs. United States, 113 U. S., 568 at 570-1 (1885);
United States vs. Philbrick, 120 U. S., 52 at 59 (1887);
Robertson vs. Downing, 127 U. S., 607 at 613 (1888);
United States vs. Railway, 142 U. S., 615 at 621 (1892);
United States vs. Bank, 31 U. S., 29 at 39 (1832);

RELEASE

Said by Mr. Justice Holmes in United States vs. Sweet, at 473.

In United States vs. Hancock, Mr. Justice Brewer said,

"If made in good faith and unchallenged as this has been for over fifteen years, whatever doubt may exist, its correctness must be resolved in favor of the title as patented." (197.)

On this point, the Court of Appeals, by Judge Severens, said,

"We have no doubt that by 'the Military Reservation at Fort Brady,' he intended the Fort Brady reservation as it was suitably described. * * * As we have said, the contemporaneous construction of the President's order was that the only exception made thereby was the Fort Brady Reservation and that construction was subsequently followed by those who were charged with the carrying the order into effect." (152 Fed. Rep. 35.) (Rec. 826.)

## SURVEY.

Second. **The Land Had Been Legally Surveyed.**

### MULLETT'S SURVEY.

Chapter 23, Laws of Congress, 1860, (12 Stat. 836), provides for issue of Porterfield Scrip "in quantities not less than forty acres," and that same may be located "on any of the public lands which have been or may be surveyed," "to be selected and located in conformity with the legal subdivisions of such surveys."

Of course, this meant a parcel of land legally and actually surveyed, not necessarily a rectangular parcel. Else all islands not equaling forty acres in extent would be barred. So would fractional parcels, especially those fractional parcels lying in more than one quarter section. But parcels of land, surveyed as separate subdivisions, including area lying in more than one quarter section, are held to be legal subdivisions. (7.)

In his instructions to the deputy, Mullett, the Surveyor General, said, respecting the Indian Reserve,

"There is an Indian Reservation of about 80 acres at the Sault Ste. Marie, for the Chippewas, as a place of encampment and for fishing. Mr. Schoolcraft reports that this survey has been located 'by the War Department in 1823, being a strip of land on the S. W. side of the falls, which is bounded by the U. S. Mill race, and its outlet, and about ⅛ of a mile above Fort Brady.' This reserve you will exclude from the survey and return a survey of its boundaries to this office." (Ex. 10, Rec. 130.)

"Reserve of 640 acres at Little Rapids, S. W. shore of the St. Mary's river, about two miles below Fort Brady, being site of the Methodist Mission. The above reserve you will exclude

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NOTE 7—Shufeldt vs. Spaulding, 37 Wis., 662 (1875);
Sheppard vs. Wilmott, 79 Wis., 15 at 19 (1891);
Wilson vs. Hoffman, 70 Mich., 552 (1888).
Same, if including area in different sections,
Lyons vs. Fairbanks, 79 Wis., 455 at 461 (1891);

from the survey, and return a survey of its boundaries to this office." (Ex. 10, Rec. 131.)

The boundaries of this reservation were actually run and marked by Deputy Surveyor Mullett in 1845, so that the Surveyor General caused the area to be calculated and fixed at 36.50 acres (Comp. Ex. "A.") (Rec. 228.) Same lay partly in Northeast quarter, and partly in Northwest quarter of Section 6, Town. 47 North, Range 1 East. It was separated by the survey from the other public lands. (Comp. Ex. "A.") This survey was under instructions from Surveyor General to the Deputy Surveyor Mullett, directing in relation to it, "This reserve you will exclude from the survey and return a survey of its boundaries to this office." (Rec. 131.)

Same directions were given as to Methodist Missionary Reserve (Rec. 131), while the directions as to reservations generally were, simply, that they be not surveyed.

It seems to have been the continuous policy of the government to survey lands so that the place and area of each parcel, equal to the minimum size purchaseable, should be fixed, and to provide for no other or further subdivision. (8.)

Evidently the object of a survey is to make area and place certain. The place and area of the Indian Reserve was completely fixed by Mullett's Survey, and the area, 36.50 acres, was less than the minimum size of purchaseable parcels, which was then, and ever since has been, forty acres, except in case of fractions. (8.)

The "Methodist Missionary Reserve," though containing 640 acres, was patented on Mullett's Survey (Rec. pp. 674-5-6).

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NOTE 8—Acts of Congress provide for survey of lands into, and sales in, parcels not less than as follows:

Act, May 18, 1796 (1 Stat. 464) Sections.
Act, May 10, 1800 (2 Stat. 73) Half-sections.
Act, March 26, 1804 (2 Stat. 277) Quarter-sections.
Act, February 22, 1817 (3 Stat. 346) Half Quarter-sections.
Act, April 5, 1852 (4 Stat. 503) Quarter Quarter-sections.

This was done pursuant to Act of Congress Ch. 189, June 22, 1860 (12 Stat. 88). But the instructions of the Surveyor General to Mullett were the same respecting this reserve as respecting the Indian Reserve (Ex. 10, Rec. p. 131).

Adsit's entry of the Indian Reserve was sustained on Mullett's Survey. The register's and receiver's certificate allowing his entry says "that it was surveyed in 1845 and the contents ascertained as appears by our maps." Adsit's entry was set aside on other grounds by the Commissioner of the General Land Office. See Spalding vs. Chandler, 84 Mich., 140, 142. At page 145, the Court says, "The land * * was surveyed by the United States as a reservation for the Indians."

If Canal Grant had not been made, and the Indian Reserve had remained intact, as surveyed by Mullett in 1845, Whelpley's duty would have been to re-run its exterior boundary as he did the original government lines of other parcels. The parcel would then have been ready for sale like the Indian Agency Reserve, and the Methodist Missionary Reserve, as soon as treaty of 1855 releasing Indian right of occupancy was ratified in 1856 (11 Stat. 631-2.)

The record shows a decision of the Interior Department by Acting Secretary Chandler (1893), to the point that lands embraced in an Indian Reserve are not officially surveyed by running of the exterior boundaries thereof. (Rec. 793-4.)

This decision relates to the Coeur d'Alene Indian Reservation. This included 736,000 acres. (Land Laws, Eminent Domain, 245 and 730.) (26 U. S. Stat. 1027-8. Rand-McNally Atlas of 1892, 318. Map of Idaho.) The Indians had seven thousand acres under cultivation. (Rand-McNally Atlas 317.) Hence, of course, the running of the outer boundaries of this reservation could not put it in the category of surveyed lands.

## WHELPLEY'S SURVEY.

Section 7, Act of Congress, September 26, 1850 (Stat. 471), provides for the survey of the village of Sault Ste. Marie, and that the

"Deputy shall prepare a plat exhibiting in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public

lots, and also the outlots, designating the lots reserved for military or other purposes according to the extent and limits of the same, as fixed by the proper military officer, pursuant to the requirements of the second section of this act."

"A survey and plat were duly made in accordance with the provisions of said act by Thomas Whelpley" (Comp. Rec. 13). "A copy of said Whelpley's plat, so far as relates to said land, is filed herewith and made a part hereof, and marked exhibit "E." " (Comp. Rec. 13.)

Exhibit "E" gives boundaries of land involved, by same courses and distances as is given in the Chandler patent. (Compare exhibit "E" with patent, Rec. 178.)

**Had Whelpley authority** to survey the parcels into which the Canal Grant had cut the Indian Reserve?

(a) Section 7, act September 26, 1850, (9 Stat. 471) provides that the "Deputy (Whelpley, as the event determined) shall prepare a plat exhibiting in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public lots, and also the outlots, designating the lots reserved for military or other purposes according to the extent and limits of the same, as fixed by the proper military officer, pursuant to the requirements of the second section of this act."

"The lines of the public surveys," in connection with which "the exterior lines of the whole village" and "the lots reserved for military or other purposes" were to be shown or exhibited, included the boundaries of the Indian Reserve, as surveyed by Mullett in 1845. (See Second Section, act September 26, 1850. 9 Stat. 469). Whelpley actually re-run and corrected, as to course and distance, all the lines of the Wescott survey and of the Mullett survey, which touched the lines of the village. (Compare Whelpley's field notes, Rec. 373, 377, with Mullett's field notes, Comp. Ex. "A." and Wescott's field notes, Comp. Ex. 36, Rec. 196-7-8.)

This was necessary to complete survey of the private claims. He was not authorized to, and did not, change any monument or fixed point on these surveys. (Compare field notes as above.) But it was necessary to completion of his

work that he retrace these lines and correct errors in course and distance, as he did. It is not easy to see how he could locate and represent on his map all the private claims without fixing anew the courses and distances. If A. E. F. G. had remained in reservation, it would have been necessary for him to have surveyed that in order, both to "designate" that parcel on his plat, and to "exhibit" the private claims or individual lots.

(b) The necessity for surveying the Indian reserve would have been more apparent if, between the act of 1850 and the survey, the Canal Grant had not been made and located. Part of that came between the Indian Reserve and many private claims, so that the courses and length of divers of the lines of divers lots were determined by the Canal Grant survey. The Canal Grant cut the Indian Reserve in three parcels, and for a considerable distance lay between the remnants of such reserve and the private claims. Note that Portage Street and the Canal Grant border on the parcel of the reserve under consideration herein. Private claims Nos. 84 and 78, and Portage and Water Streets border on the parcel of the Reserve south of the Canal Grant.

Can it be supposed that Congress intended that any of the lands within the village should be left unsurveyed? When we read Sections 2 and 7, we cannot doubt that Congress intended that the map to be made by the deputy should show the location and boundaries of all parcels of land in the village:—that no further survey by the United States of any land in this village should be necessary.

Perhaps Congress intended that the officer designated by the War Department should survey the Indian Reserve, but evidently the War Department did not so construe the act. Col. Abert, to whom the matter was referred, reported as follows:

"Bureau of Topographical Engrs.
Washington, June 21, 1852.

Sir:

The 2d Section of a law of September 26, 1850, (Stats. at Large, Vol. 9, page 469) requires the War Department

'to designate, or cause to be designated, upon the map aforesaid, the position and extent of lots necessary for military

purposes, as also the position and extent of any other lot or lots which may be required for other public purposes, and also the position and extent of the Indian Agency tracts, and of the Indian Reserve,'

that is,

1st. Position and extent of the lots for military purposes.

2nd. Position and extent of other lots for other public purposes.

3rd. Position and extent of the Indian Agency.

4th. Position and extent of the Indian reserve.

In the map submitted to the consideration of the War Department, with a report from this office of the 17th instant, there is marked upon,

1st. The position and extent of lots for military purposes, as far as the same can now be designated.

2nd. The position and extent of other lots for other public purposes. The only other public purposes known to this office, for which land should be reserved, are the probable wants of the contemplated canal; for these purposes ample space is reserved and marked on the map which is attached to the reports from this office of the 17th instant.

3rd and 4th. Being uninformed of the Indian Agency, and of the Indian reserve, or of any necessity for such reservations in that quarter, no lots have been marked or designated for these purposes. If the object be a reserve upon which to erect an Indian Agency house, it is believed that ample space is provided in the present Military Reserve, out side of the Fort Brady pickets, for which purposes, if required, special lots of this reserve can be hereafter assigned. All of the letters and papers on this subject which have been referred to this office, are hereto affixed.

Respectfully Sir,
Your Ob't. Serv't.,
J. J. Abert,
Col. Corps T. Eng'r.

Hon. C. M. Conrad,
Secretary of War." (Rec. 155.)

This report was adopted and acted upon.

(c) There had been one survey by Deputy Edmunds, which had been approved by the Reg. and Rec. and the Sur-

veyor General, and sent to the General Land Office. But this had been rejected as inaccurate by the Commissioner. (See opinion of Secretary in Gamble vs. Sault Ste. Marie, 10 Land Decisions, 375.)

Also there had been a preliminary survey under the act by Deputy Mullett (Rec. 143-4-5), which also was insufficient. Mullett had been relieved and Whelpley employed. Such circumstances emphasized to Whelpley the necessity for thorough and complete work.

(d) Spalding vs. Chandler (160 U. S., 394), related to this land. Therein Mr. Justice White said (406),

"The map of the survey ordered to be made, of the village, was required to have noted upon it the boundaries, not only of the Military Reserve, but of the Indian Reserve."

The Canal Grant had been located, cutting, as Mr. Justice White says (P. 399) "the reservation into three parcels, two of which lay north of the canal and one south of the canal."

How could the map "have noted upon it the boundaries * * * * * of the Indian Reserve" without a survey of these three parcels?

(e) When the survey was certified to by Surveyor General and approved by him (September 4, 1855) these lands outside the Canal Grant had been released from reservation by order December 9, 1852 (Rec. 163), and the treaty for surrender of Indian right of occupancy had been signed, and its ratification was, no doubt, a foregone conclusion. (11 Stat. 631.)

Under these conditions was it not incumbent upon Whelpley, in carrying out the spirit of the act of September 26, 1850, (9 Stat. 469), to survey all the fractional parcels of the old Indian Reserve? If it was the duty of the War Department to make the survey necessary to completion of his map, as directed by Congress, and the War Department had failed, did it not become his duty to do this mere detail work necessary to completion of his own work, and to secure the results—a complete survey of the village—contemplated by Congress?

**Contemporaneous Official Construction.**

The view that act of September 26, 1850 (9 Stat. 469), did authorize such survey has been sanctioned by all concurrent and subsequent official action relating to same.

**Register** and **Receiver** approved of the plat and endorsed the same.

They approved of Chandler's location and certified on same, in written addition to printed blank, "the above described tract has been surveyed, and is not otherwise appropriated." (This refers to the Whelpley Survey.) (Reg. and Rec. certificate attached to Chandler's application. Rec. 170.)

The survey of the Indian Agency Reserve stands on same ground as to authority to survey. Whelpley surveyed that into two parcels. (See map. Defts. Ex. 12½, Rec. 330.)

Reg. and Rec. accepted entry of said parcels, and Land Office caused patents to be made to James P. Pendill. (See Pendill Patents. Rec. 328-9-0.) True, the Commissioner of the Land Office caused recalculation of the area of these parcels, but he used Whelpley's Survey to make the plat, and, of course, the calculations also. Difference between Whelpley's and Commissioner's calculation of area one-hundredth of an acre.

The **Surveyor General** approved of the survey and map of Whelpley. (His certificate on Whelpley Map, Rec. 163.)

The **General Land Office** approved of the survey and map.
By making same part of the records of his office.
By approval of Chandler's location.
By patent to Chandler.
By approval of entry of Pendill on two parcels of Indian Agency Reserve, as surveyed by Whelpley, and Patents to Pendill of the same, as above stated.

That these patents to Pendill rested on the Whelpley survey is apparent.

(a) Each patent recites that the same is "according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General." (Rec. p. 329-0). No survey of these lands was ever "returned to the General Land Office by the Surveyor General" except the Whelpley survey.

(b) Part one of the Indian agency reserve was sold for $161 per acre. Part two was sold for $36 per acre. On account of this high price per acre, it seems that the Commissioner of the General Land Office thought it wise to recalculate the area of these two parcels, which he did.

(c) Under date November 14, 1873, the Commissioner of the General Land Office and ex-officio Surveyor General of Michigan, certified on the plat of the Indian agency reserve as follows:

"I hereby certify that the above plat of the first and second part of the Indian agency reservation in the village of Sault Ste. Marie, Township 47 North, Range 1 East, in the state of Michigan, has been constructed from the field notes on file in this office, and areas calculated in pursuance of the act of Congress, approved 22nd of January, 1853."

This certificate is on complainant's exhibit 61, being part of the Indian agency reserve. By some accident same does not appear in the printed record.

(d) Compare Whelpley's field notes (Rec. 331-2, 392-3) and plat (Deft's Ex. 12½, Rec. 330) with special plat prepared under direction of the Commissioner of the General Land Office (Comp's Ex. 61, Rec. 737).

**Interior Department** approved of same.

Action on Chandler's application by Secretary Teller on 8th of June, 1883. (Rec. 176.) He says, "the tract contains 9.10¾ acres * * * * * and is a fractional part of Section 6 * * * * * as appears by an Official Survey made in 1855."

Letter Secretary of the Interior to General Land Office, June 28, 1881, (Rec. 182), referring to letter Sec. of War, 14th

of June, 1881, asking reservation of the parcel herein involved. (See letter General Land Office to Reg. and Rec., October 13, 1881. Copp Land Owner, Vol. 8, P. 144. Rec. 171-2-3.)

**War Department** approved of same.

It asked and procured reservation of the other two parcels of Indian Reserve, describing such parcels as they are described in Whelpley's Survey, though not using the words "Whelpley's Survey," (Letter Lincoln, Sec. of War, to President, 9th of June, 1882, and Executive Order 10th of June, 1882. Rec. 321-2.)

Also letter Gen. Wright to Sec. of War, February 12, 1883. (Rec. 186-7.)

Whelpley's Survey is adopted in this case by the Department of the Interior and the Department of Justice. That survey alone names these islands one and two. (Compt. Ex. A and E.) Without that survey of the Indian Reserve, the designation islands one and two is meaningless.

There is **other authority** for the survey of the fractional parts of the Indian reserve by Whelpley. The act of Congress of March 26, 1804 (2 Stat. 277), contains this provision:

"And it shall also be the duty of the said Surveyor General to cause to be run, surveyed and marked such of the Indian boundary lines of the said lands as have not yet been surveyed."

When in 1855, Whelpley was making his survey, the Canal act of 1852 had been passed. That act granted to Michigan, for canal purposes, a strip four hundred feet in width through the Indian reserve, thus reducing its area and leaving the remainder in three separate parcels. (See diagram 1.) If it can be said that those three parcels had "not yet been surveyed," it was Whelpley's duty to run and mark their boundaries under the act of 1804. Those parcels were surveyed and platted by him, and his plat and survey were adopted and approved by the Surveyor General and the Commissioner.

If, therefore, there be any question as to Whelpley's authority to survey the three fractions of the Indian reserve

LOSE TO EDGE

under act September 26, 1850, there can be no question as to the authority of the Surveyor General, under act of 1804, to direct Whelpley to survey them. His subsequent adoption of Whelpley's survey is equivalent to such direction.

**Was there need of special authority** from Congress to authorize the Surveyor General to cause this Indian Reserve to be surveyed by Whelpley? Is not the general law sufficient warrant for that purpose?

Act of May 18, 1796, (1 Stat. 464), provided that the Surveyor General should engage deputies

"whom he shall cause, without delay, to survey and mark the unascertained outlines of the land lying northwest of the River Ohio, and above the mouth of the River Kentucky, in which the titles of the Indian tribes have been extinguished."

Act of March 26, 1804, (2 Stat. 277), provided

"that the powers vested by law in the Surveyor General shall extend over all the public lands of the United States to which the Indian title has been or shall hereafter be extinguished, north of the River Ohio and east of the River Mississippi, and it shall be the duty of the said Surveyor General to cause the said lands to be surveyed."

Act of June 12, 1840, provided

"that it shall be the duty of the Secretary of the Treasury to take all necessary measures for the completion of the surveys in the several districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law." (5 Stat. 384.)

Act of 1st of March, 1847, creating land district of the Upper Peninsula of Michigan, provides that

"all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands under the laws now in force for the sale of public lands, excepting and reserving from such sales, Section 16 in each township for the use of the schools, and such reservations as the President shall deem necessary for public uses." (9 Stat. 146, Sec. 2.)

Under such legislation, was it not the duty of the Commissioner of the General Land Office, or Surveyor General, to cause a survey to be made, as early as practicable, of the Indian Reserve, if the Surveyor General did not understand that the same had been surveyed by Mullett in 1845? In other words, was an act of Congress necessary for a special survey of an Indian Reservation of 36.50 acres, the outer boundaries of which had been run and reported by the deputy, and approved by the Surveyor General and the General Land Office?

Whelpley was surveying the village of Sault Ste. Marie and certainly had authority to survey all except the Military Reservation, and the Indian Reserve, and the Indian Agency Reserve. The Indian Reserve, so-called, was simply incumbered by an Indian right of occupancy for purposes of encampment convenient to fishing grounds. A treaty had been made releasing the land from this incumbrance, and there only remained ratification and proclamation at the time of Whelpley's Survey of the Indian Reserve. (11 Stat. 631-2.)

**Unauthorized Survey is Validated by Subsequent Authorization.** (9.)

In Doswell vs. De La Lanza, Mr. Justice McLean said,

"If the surveys were void when made west of the Nueces as being without the limits of San Patricio County, they were made valid by the subsequent approval of the county surveyor after the county limits were extended west of that river." (33).

In Spencer vs. Lapsley, Mr. Justice Campbell said,

"It was a common practice in Texas for empresarios and

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NOTE 9—Taylor vs. Brown, 9 U. S., 234, 245-6 (1809);
Doswell vs. De La Lanza, 61 U. S., 29, 33 (1857);
Spencer vs. Lapsley, 61 U. S., 264 (1857);
Boardman vs. Reed, 31 U. S., 328, 336 (1832);
Stringer vs. Youngs, 28 U. S., 320, 338-9-0-1 (1830);
Jones vs. Menard, 1 Tex. 771, 789 (1846-7);
Howard vs. Perry, 7 Tex. 259, 266-7 (1851).

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others to have their surveys completed in anticipation of the arrival of colonists or the measurements requisite for the procurement of the final title. The return of such surveys by a surveyor and their recognition by the commissioner or alcalde was treated as a substantial compliance with the law. A surveyor might adopt the surveys of other persons." (271-2.)

In this case there was a dissenting opinion, but the same does not question the decision in Doswell vs. De La Lanza.

In Stringer vs. Young, Mr. Chief Justice Marshall said,

"This also appears to have been substantially decided in the case of Taylor vs. Brown. In that case, Taylor's survey was made by Hancock Taylor, who was killed by Indians, so that he never returned the plat and certificate of survey to William Preston, the principal surveyor, as was required by law. His field-notes, however, were brought to the principal surveyor, who made out a plat and certificate of survey from them. To the objection, that the plat and certificate not having been returned to the office, the survey was not completed, the court answered, 'this survey, then, is, in law language, made by William Preston. It is confirmed as a survey made by him; the law recognizes it as his survey. Assuredly then, his certificate may authenticate it.' " (340-1.)

## Did Whelpley in Fact Survey?

Neither the verified field notes of Whelpley found in State Land Office, nor the record of same in General Land Office, show any field notes of Whelpley's Survey of the parcels of the Indian Reserve. (Rec. 371.) But there cannot be any doubt but that he did actually survey these parcels.

(a) His map (Comp. Ex. "E," Rec. 163) shows that he did. The map shows his field notes in full.

O'Hare, head of a tracing division of General Land Office, laid upon a map Whelpley's meander as per his field notes on his map, and Mullett's meander as per his field notes (Defts. Ex. 37, Rec. 214.) The substantial coincidence of these lines could only arise from two actual surveys, or from fraud on

Whelpley's part, committed by laying upon a map the meander lines of Mullett's survey, and then, by calculation, determining the relation of meander lines of an imaginary survey to the same. Such a work would have taken more time than an actual survey.

These meander lines are practically coincident, except at a point where a change of wind might make all the difference shown by the two lines. (Rec. 295-6.) At this point the meander lines are about fifty feet apart, (Map, Comp. Ex. 37, Rec. 215), and this difference would be accounted for by about one foot rise or fall in the water. (Rec. 295-6.) Such rise or fall would result from change of medium to strong wind. (Rec. 295-6.)

(b) Whelpley is dead. (Rec. 327.) So are all his assistants except Luke Durocher. (Rec. 259-0.)

Durocher testifies to the actual survey by Whelpley of the Indian Reserve. (Rec. 259.)

**Paper Pamphlets.**

(c) In the State Land Office in Michigan, with Whelpley's map and his verified field notes, are two **paper pamphlets** containing field notes of practically his entire survey, including the Indian Reserve in two parts. (Rec. 344-5. Rec. 351 to 360. Rec. 542-3, 557-8. Ex. 46 to 51. Rec. 549 to 552. Rec. 727.)

Photographic copies of these paper pamphlets constitute pages 351 to 360 inclusive of the Record. They are indisputably in Whelpley's hand writing, the same hand writing that appears in the verified notes. (Vant Hoff, Rec. 345-6. Photos, Rec. 351 to 360, and Rec. 533 to 559. Cairnes, Rec. 537. Ripley, U. S. Engr., Rec. 727-735.) They appear to have been copies from Whelpley's original notes of his survey made in the field. (Hodgman, Rec. 717. Ripley, U. S. Eng'h., Rec. 734-5, 727.)

These paper pamphlets appear to be a journal of his field notes. The evidence of every expert surveyor called (and they were all called by the complainant( shows that they are an earlier draft of the notes made in the field than are the verified field notes. (Skeels, Rec. 704 to 711. Hodgman, Rec. 712 to 717. Ripley, U. S. Eng'r in charge, Rec. 719, 727-28, 734.)

They contain notes of every private claim shown on the Whelpley map and almost without exception correspond exactly with the field notes on that map. (Compare photographic copies, Record 351 to 360, inclusive with verified field notes. Rec. 370 to 533.)

The verified field notes are a transcript from some earlier notes. (Ripley, U. S. Eng'r., Rec. 734-5. ) Such must be the fact from the nature of the business.

They are arranged, not in the order of the survey as actually made, but in a convenient order for use in connection with the map. (Ripley, U. S. Eng'r., Rec. 727-8, 734-5. Compare field notes with map.)

The paper pamphlets appear to contain field notes of the survey in the order in which the work was done in the field, (Ripley, U. S. Eng'r., Rec. 734) and the experts agree that the notes in these paper pamphlets were probably made by Whelpley from the original notes in the field. (Ripley, U. S. Eng'r., Rec. 734-5. Hodgman, Rec. 715, 717. Ripley, 727-8.)

That his object in making them was for convenience in making his map. (Hodgman, Rec. 713, 718.)

There can be no doubt that Whelpley actually surveyed the Indian Reserve, and the only explanation of the failure of the verified field notes to show the survey of the Indian Reserve is that, in transcribing from the original notes, or the sheets photographed, they were, by accident, omitted.

The so-called paper pamphlets are found in the proper office, to-wit: the State Land Office of Michigan. (Rec. 344-5, 557-8, 549-552.)

That they are not marked "Filed" is immaterial. (10.) Neither are the verified field notes. (Rec. 533 to 559.)

In Wright vs. Roseberry, Mr. Justice Field said: "Objection was taken to a copy of this map because the one deposited in the office of the Surveyor General of the state was not marked as filed. If such was the case, the omission was one of that officer, and could not affect the validity of the map as evidence." (Rec. 514.)

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NOTE 10—Wright vs. Roseberry, 121 U. S., 488 (1887); Beebe vs. Morrell, 76 Mich., 114 at 120 (1889).

(d) It is the survey and not the filing or record or verification thereof which avails. (11.)

**Survey Not Open to Collateral Attack.** (12.)

In Russell vs. Land Grant Co., Mr. Justice Brewer said,

"A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any collateral attack in the courts. By Section 453, Revised Statutes, full jurisdiction over the survey and sale of the public lands of the United States, and also in respect to private claims of land, is vested in the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior." (256.)

In Cragin vs. Powell, Mr. Justice Lamar said,

"The power to make and correct surveys of the public lands belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or oginal power to make similar corrections, if not an elementary principle of our land law, is settled by such

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NOTE 11—Stringer vs. Youngs, 28 U. S., 320, 339 (1830);
Taylor vs. Brown, 9 U. S., 234, 242 (1809).

NOTE 12—Russell vs. Land Grant Co., 158 U. S., 253 (1895);
Cragin vs. Powell, 128 U. S., 691 (1888);
Knight vs. U. S. L. A., 142 U. S., 161 (1891);
Stoneroad vs. Stoneroad, 158 U. S., 240, 248-9 (1895);
Burfenning vs. Railway, 163 U. S., 321, 323 (1896);
Gardner vs. Bonestell, 180 U. S., 362, 369 (1901);
Corporation vs. Gibbon, 158 U. S., 155, 176 (1895);
Steele vs. Smelting Co., 106 U. S., 447, 450-1 (1882).

a mass of decisions of this court that its mere statement is sufficient." (698-9.)

In Knight vs. U. S. Land Associations, Mr. Justice Lamar again says,

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the Courts except by a direct proceeding." (176.)

Respecting the sufficiency of Mullett's survey as a basis of sale, the Circuit Court of Appeals expressed no opinion. After considering the facts relating to it, Judge Severens said,

"We postpone for the moment the consideration of the question of the sufficiency of the Mullett survey to justify a sale or other disposition of the land without a further survey." (152 Fed. Rep. 32.) (Rec. 823.)

Thereafter he considers the Whelpley survey and says,

"The Whelpley survey was adopted by the department, and has since been acted upon as the final public survey. We may here conclude what we propose to say about the objection that the Chandler patent is void because there then had never been any survey of the land. It is true there has never been any survey of the land upon the lines of sections and subdivisions as when such method of surveying is practicable. There are many instances where the public lands, if sold at all, must be surveyed in a different way from the more common method employed in a wide expanse of territory. The object of survey is as fully attained. If the land was at the time subject to the control and disposition of the department, we cannot think that its disposal upon the existing surveys could be assailed, certainly not in this collateral way." (152 Fed. Rep. 32-3.) (Rec. 823.)

THIRD. Chandler, **patentee, was not in employ of United States** at time of location, May 17, 1881. (Rec. 238, 248-9, 270.)

## CHANDLER PATENT NOT VOID.

Because,

FOURTH. Same is based on location of **Porterfield Scrip** on land within the limits of an **incorporated village.**

The act for the relief of the legal representatives of Charles Porterfield required the Sec. of the Int. to issue to Porterfield's executors "a number of warrants equal to six thousand one hundred and thirty-three acres of land, according to the usual subdivisions of the public surveys, in quantities not less than forty acres; to be by them located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location, within any of the States or Territories of the United States where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre; to be selected and located in conformity with the legal subdivisions of such surveys." (12 Stat. 836.)

The Department of the Interior has uniformly held that this scrip can be located on offered and unoffered land within the limits of an incorporated village. (13.)

In McChesney vs. Aberdeen, Secretary Smith said:

"It is the ruling of the Department that the mere fact that a tract of government land has been included within the corporate limits of a city or town, does not prevent entry of the same under the general land laws, provided that said tract of land cannot be entered as a townsite by the authorities of said town or city. Harper vs. Grand Junction (on review) (16 L. D., 127)."

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NOTE 13—Williams vs. Brown, 1 Hill's Leading Cases, 74;
Lewis vs. Seattle, 1 Dec. of Dept. of Int., Pub. Lands, p. 497 (1881);
Citing case of Reed (A. D. 1864), 1 Hill's Leading Cases, p. 74;
Haper vs. Grand Junction, 16 Dec. of Dept. of Int., Pub. Lands, p. 127 (1893);
McChesney vs. Aberdeen, 16 Dec. of Dept. of Int., Pub. Lands, p. 397 (1893);
Application of John Torrent (Defts. Ex. 10, Rec. 323).

**Lands Not Offered.**

It is competent to locate Porterfield Scrip on unoffered as well as offered lands. (13a.) See also attached to the scrip on which Chandler located this land, note saying, "This warrant may be located upon unoffered lands." (Rec. 166.)

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NOTE 13a—Bovard vs. Bunn, No. 634 Copps Land Laws, 803;
Opin. Comr. G. L. O., 28th June, 1871;
Opin. Atty Gen., Vol. 2, p. 506;
Opin. Atty Gen., Vol. 3, p. 382;
Byron Reed, Hill's Leading Cases, Vol. 1, p. 74;
Wm. P. Brown, Hill's Leading Cases, Vol. 1, p. 45;
Lewis vs. Seattle, 1 Land Dec., 397;
Harper vs. Grand Junction, 16 Land Dec., 127;
McChesney vs. Aberdeen, 16 Land Dec., 127;
Chandler vs. Sault Ste. Marie, 10 Copps Land Owner, 98.

ESTOPPEL

III.

**United States is estopped** to claim invalidity of the Chandler Patent, because of

(a) The **decision of the Secretary of the Interior** approving Chandler's application and acquiescence in such decision. (14.)

Such application was allowed after two and a half years contention, including four hearings, against opposition of Village of Sault Ste. Marie, Comr. of Indian Affairs and War Department.

For many years there have been dealings between appellant and respondent, all of which have proceeded upon the basis that respondent was owner of the mainland under the patent. (Rec. 192-3-4, 285-6, 343, 571-2.)

Such allowance pre-supposes that the land was not under reservation and that it was surveyed. That it was surveyed is expressly found by the Secretary. (Rec. 176.)

This decision has been acquiesced in by the United States for over twenty years—from June 8, 1883, to September 1, 1903—and is still acquiesced in except as the question is raised herein by the attorney of the Michigan Lake Superior Power Company.

In Ballance vs. Forsyth, Mr. Justice Campbell said,

"It is the settled doctrine of this Court that in the location and survey of claims arising under acts of Congress like those of May, 1820, and March, 1823, the Executive Department has, in general, exclusive jurisdiction, and that all questions arising upon their location and survey are administrative in their nature and must be disposed of in the Land Office." (185.)

Illinois Steel Company vs. Budziscz involved the validity of a patent challenged on account of an outstanding Indian right. Therein Judge Seaman said,

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NOTE 14—Ballance vs. Forsyth, 65 U. S., 183, 185 (1860);
Ill. Steel Co. vs. Budzisz, 82 Fed., 160, 161 (1897);
U. S. vs. Cal. Land Co., 148 U. S., 31, 43 (1893);
Leavenworth vs. U. S., 92 U. S., 733 (1875).

All questions as to entry and right to patent were then determinable by that tribunal, and the patents were not void, although they may have been voidable at the proper instance." (161.)

In U. S. vs. Cal. Land Co., 148 U. S., 31 at 43, Mr. Justice Brewer said, "Now it is familiar law that when jurisdiction is delegated to any officer or tribunal his or its determination is conclusive."

A disregard of this decision of the Secretary of the Interior, and of the rights which have grown up under the same, would justify the language of Mr. Justice Field in a dissenting opinion in Leavenworth vs. U. S., wherein he said,

"The government of the United States, through one set of its officers, after mature deliberation and argument of counsel, has issued its certificates or lists, that the lands in controversy were covered by the grant, and has thus encouraged the expenditure of millions of money in the construction of a public highway, by which the wilderness has been opened to civilization and settlement; and then, on the other hand, after the work has been done and the money expended, has, with another set of officers and all the machinery of the judiciary, attempted to render, and has succeeded in rendering, utterly worthless the titles it aided to create and put forth upon the world. Such proceedings are not calculated, in my judgment, to enhance our ideas of the wisdom with which the law is administered, or of the justice of the government." (759.)

We may add that this is attempted, in this case, at the beck, and in the interest, of a private corporation.

**Scant Equity.**

(b) The complainant, the sovereign, seeks the aid of a court of equity on ground of alleged technical invalidity of its patent. The attack is made more than twenty years after the location was allowed by the Secretary of the Interior on second hearing on appeal, which was on June 8, 1883. (Rec. 176.) The patent issued December 15, 1883 (Rec. 179-80), nearly twenty years before the bill was filed, which was on October 26, 1903 (Rec. 18).

ESTOPPEL.

Location filed with, and rejected by, Reg. and Rec., May 17, 1881 (Rec. 169-70). Appealed to G. L. O. Allowance opposed before Comr. by village of Sault Ste. Marie, by Comr. Indian Affairs and by War Dept. (Rec. 171.) Location allowed by Comr. G. L. O. October 13, 1881 (Rec. 171-2). Appealed to Sec. of Int. Decision by Sec. of Int. reversing G. L. O. and disallowing location, January 31, 1883 (Rec. 173-4). Motion for rehearing. Sec. of Int. recalls decision disallowing and confirms allowance of location by Comr. G. L. O. June 8, 1883 (Rec. 176-7-8).

Judge Severens said,

"It does not appear that the particular objection now made was presented to the Commissioner. But the matter of the reservations in the locality, including the land applied for, must have been under his observation; and the issuance of the patent is at least prima facie evidence that no valid objection to its issuance was deemed to exist. The Land Office then had, and has continued to have, in its possession the same data for raising the question of the validity of the patent, that are made the basis for the contention now made. Upon the faith of the grant, the patentee and his grantee have made permanent improvements upon the land, costing from $135,000 to $150,000." (152 Fed. Rep. 25 at 40.) (Rec. 832.)

How does such a case appeal to the conscience of this court? (15.)

In Mich. Pipe Co. vs. Freemont, Judge Sanborn said,

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty and reasonable diligence will move it to action." (287.)

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NOTE 15—Pipe Co. vs. Freemont, 111 Fed. Rep., 284, 287 (1901);
McCabe vs. Mathews, 155 U. S., 550 (1895);
Pope Co. vs. Gormully, 144 U. S., 224, 236 (1892);
Nickerson vs. Nickerson, 127 U. S., 668, 676 (1888);
May vs. Schofield, 6 D. C., 235, 239 (1867);
Ins. Co. vs. Brown, 30 N. J. Eq., 193 (1878).

In McCabe vs. Mathews, Mr. Justice Brewer said,

"A decree for the specific performance of a contract for the sale of real estate does not come as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all circumstances of the case." (553.)

In Pope Co. vs. Gormully, Mr. Justice Brown said,

"To stay the arm of a court of equity from enforcing a contract, it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law." (236.)

Ordinarily estoppel cannot be urged against the United States, the sovereign, when the suit is brought and prosecuted in its interest and to secure to it any governmental or property rights. And it is herein claimed that the "defenses of stale claim and laches cannot be set up as a bar" against the sovereign. Under some circumstances, this is true, but not in such cases as this. Herein the general equitable rule applies. (16.)

In Woodruff vs. Trapnell, Mr. Justice McLean said,

"We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality than belong to the ordinary transactions of individuals." (207.)

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NOTE 16—Woodruff vs. Trapnall, 51 U. S., 190 (1850);
United States vs. M. R. Co., 54 Fed. 807, 811-2 (1892);
Indiana vs. Milk, 11 Fed., 389, 397 (1882);
People vs. Michigan C. R. Co., 145 Mich., 140 (1906);
U. S. vs Arredondo, 31 U. S., 691, 712 (1832);
U. S. vs. Walker, 139 Fed., 409, 412 (1905);
U. S. vs. Ch. D. W. P. Co., 152 Fed. 25 (1907).

This is quoted with approval in United States vs. M. R. Co. (811-2.)

In Indiana vs. Milk, Judge Gresham said,

"Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel." (397.)

In People vs. Michigan Central Railroad Company, Judge Grant said,

"When the state enters into purely contractual relations with its citizens, it should be bound by the same rules of construction that bind its citizens with whom it contracts. * * * * The state, of all parties contracting, should deal fairly and honestly with its citizens. (160.)

In United States vs. Arredondo, Mr. Justice Baldwin said,

"By consenting to be sued and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man on the same subject matter." (712.)

In United States vs. Walker, Judge Jones said,

"When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors." (412.)

Herein Justice Severens said,

"It derogates from the dignity and character of the government to suppose that, formed as it is, to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." (152 Fed. Rep. 25 at 41.) (Rec. 832.)

(c) There has been **no offer to return** Chandler's **Porterfield Scrip.**

All rules of law and of morals require a grantor, before disaffirming or rescinding a grant, to return the consideration. The United States retains the Porterfield Scrip. Evidently it does not intend to disaffirm, or rescind, this patent. The attack on same herein is unauthorized.

## LIMITATION.

Why is not any attack on the patent by the United States now barred by limitation? Act of Congress, chapter 559, approved March 3, 1891, volume 26, Stats. at Large, page 1093, provides "that suits by the United States to vacate and annul any patent heretofore issued, shall only be brought within five years from the passage of this act."

The patent was issued Dec. 15, 1883. (Comp. Sec. 14, p. 25). This action was not commenced until nearly twenty years thereafter.

It seems to us that this statute bars the attack of the United States upon the Chandler patent on all grounds except, perhaps, one. The spirit of the statute is approved and favored by this Court. Respecting it, Mr. Justice Brewer said,

"Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States, and open to sale and conveyance through the land department. * * * *

It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification, or patent, by providing that, after a certain time, the Government, the grantor therein, should not be heard to question them." U. S. vs. Railroad, 165 U. S., 463 at 476.

The modern doctrine is that statutes of limitation, negative or positive in form, give, not simply immunity from action, but, title to the property adversely possessed. (17.)

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NOTE 17—Campbell vs. Holt, 115 U. S., 620, 622-3 (1885);
Leffingwell vs. Warren, 67 U. S., 599, 605 (1862);
Bickner vs. Comstock, 113 U. S., 149, 152 (1885);
Sharon vs. Tucker, 144 U. S., 533, 543-4 (1892);
Shelby vs. Guy, 24 U. S., 361, 370-1-2 (1826);
Dickerson vs. Colgrove, 100 U. S., 578, 583 (1879);
Chapin vs. Freeland, 142 Mass., 383 (1886);
Preston vs. Briggs, 16 Vt., 124, 130 (1844);
Eingartner vs. Ill. Steel Co., 103 Wis., 372, 375 (1899);
Nelson vs. Jacob, 99 Wis., 547 (1898).

Counsel claim that the patent does not draw to itself the protection of this statute because same is void, being of land in reservation.

Counsel cite one decision of this Court somewhat to the point, wherein Chief Justice Marshall said,

"The conveyance being made by a person having no authority to make it, is of no validity, and cannot connect the purchaser with the original grant." (Powell vs. Harman, 27 U. S., 241.)

This decision went in line with, and affirmance of, the then supposed doctrine of the Supreme Court of the state of Tennessee. This doctrine having been disaffirmed by the Supreme Court of the state of Tennessee, this case, Powell vs. Harman, was twice expressly overruled on this point by this Court. (18.)

In Toll vs. Wright, Chief Justice Cooley said of Patton vs. Easton and of Powell vs. Harman,

"They were both overruled in Green vs. Neal's Lessee, 6 Pet. 291, on the authority of a later state decision. They may consequently be dismissed from consideration as being without weight as precedents." (98-9.)

Divers States have enacted divers limitations to the attack upon tax deeds. Under such statutes, the Courts have held that papers purporting to be tax deeds, describing lands not subject to taxation for the supposed taxes, did not draw to them the protection of the statute. But the reasons applying to an attack by the United States upon a so-called patent of land under Executive Reservation, seem to us to be quite different from the reasons applying to an attack by a land owner upon a so-called tax deed upon his land, based on a tax to which the land was never liable.

Is there any logical reason why the limitation should not run against an attack upon the patent on account that the land was under Executive Reservation? In law, the reservation

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NOTE 18—Green vs. Neal, 31 U. S., 291, 301 (1832);
Gelpcke vs. Dubuque, 68 U. S., 175, 212-3 (1863);
Toll vs. Wright, 37 Mich., 93, 98-9 (1877).

causes an artificial distinction between the land under reservation and other lands of the same nature, which artificial distinction is subject to removal at any time, for any reason, by the same power that made it, and that makes the patent and that enacts the limitation. In the instant case, all departments of the government supposed this distinction to have been annulled, the reservation to have been withdrawn, and the lands to have been restored to the body of "public lands."

If the thing patented were in its essence, governmental property (jus publicum), necessarily held in trust for governmental purposes, then the so-called patent would be **ultra vires**, no patent. It would not then draw to itself the protection of the statute. But the fact that this parcel of land may have been temporarily under reservation, and hence, by reason of such temporary reservation not "open to sale and conveyance," does not seem to us to emasculate the patent.

The government, the Executive on recommendation of the Land Department, declared the reservation. The government, the Executive and the Land Department declared the reservation released and made the patent. Does not the statute now forbid the government, the Department of Justice, to say that the other departments were in error respecting the release?

Upon this point, Judge Severens said,

"Counsel for complainant raise two objections to the application of this statute. One is that this suit is not a suit to annul the Chandler patent, but only to maintain the title to these islands and that they attack the validity of the patent only for the purpose of maintaining the title to the islands. This amounts to a contention that although the patent could not be attacked directly, after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right to which flows from the patent itself. The proposition is too plainly untenable for argument. But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitation vests the title in him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assum-

ing it to have had any, was complete at the date of the passage of the Act and the lapse of five years without action to annul the grant resulted in the confirmation of it.

The other objection to the application of this statute is that, if as contended, the Chandler patent is absolutely void, the statute cannot apply 'because,' quoting from the brief, 'in legal effect no such patent ever existed. Statutes of limitation may protect a voidable title from any question as to its validity, but no statute of limitations can operate upon a thing that never existed.' This statement of statutory limitations is open to criticism. But it is sufficient now to say that the statute in question is general and contains in itself no exception. When it speaks of vacating or annuling patents, of course it means the grants of title which the patents purport to make, and which the United States had lawful right to make.'' (152 Fed. 25 at 29.) (Rec. 819, 820.)

## IV.

## ISLANDS DID PASS BY PATENT OF MAINLAND.

This seems to us to be the only point properly presented for consideration. So Judge Wanty held.

On this point, Judge Severens said,

"We are much impressed by the contention of the appellee that the court below was right in holding, as it did, that upon this bill the question of the validity of Chandler patent is not a legitimate subject of inquiry. It is not a direct attack. There is no prayer that the patent be declared void." (152 Fed. Rep. 25 at 30.) (Rec. 821.)

Thereafter Judge Severens discusses the law and facts relating to reservation and survey and proceeds thus,

"The Chandler tract was therefore open to the location of the scrip, and had been adequately surveyed. The location of the scrip was permissible, and the patent was and is valid.

We come then to the question which is of more general interest to the United States, and the one which constitutes the direct object of the bill. And this is whether the ownership of the mainland carries with it the title to the islands lying between it and the thread of the stream." (152 Fed. Rep. 25 at 36.) (Rec. 827.)

## DESCRIPTION OF ISLANDS.

The islands in question are simply low piles of loose boulders and broken stone left in the rapids, or sault, of the river, projecting but a few feet above the surface of the water, with trees and bushes growing between the boulders and loose stone. (Comp. Rec. 2, Ripley, Rec. 234-5, 244-5, 730-1. Photographs, Rec. 679 to 681.)

They are cut by cross currents into many islands. (Ripley, Rec. 244-5, 730-1, Kingan, Rec. 289-90.)

Judge Wanty, who knew them well, described them as "about an acre and a half of rock." (Rec. 45.)

There is no **navigation** of the river at this point, except by floating of forest products down stream, and the shooting of the rapids in canoes by tourists. Navigation past the place on the islands is by slack water through the canal.

The only practicable way of running logs over the rapids is to let them loose above the rapids, and boom them below. (Kingan, Rec. 305. Ripley, Rec. 736.) Running rafts down the falls was discontinued in 1885 or 1886. (Ripley, Rec. 736.)

Canoes go up by poling inside or outside of Island No. 2. Those going inside of Island No. 2 go out into the main stream between Islands 1 and 2, for the most part. Some may possibly go up inside of Island No. 1. (Kingan, Rec. 302.)

The combined area of the islands is less than an acre and a half. (Comp. Par. II, Rec. 1.) They are distant from the south shore about one-tenth of the distance from south to north bank of the river (Rec. 265), and about one-fifth of the distance from south shore to the international line. (Comp. Ex. "A" 5, Maps 1 and 2.)

At the islands, the River is about four thousand feet wide, including islands. There are large islands on the Canadian or Ontario side, and small islands (including 1 and 2) on the American or Michigan side. The international boundary is midway between the north and south shores, and quite close to the outer edge of the large islands on the Canadian side. (Comp. Ex. 5. Maps Nos. 1 and 2, P. 7.)

## VALUE OF ISLANDS.

Judge Wanty said of them,

"Those insignificant islands whose only value to the complainant, if it does not own the upland, seems to lie in their position to form the subject matter of a cause for the determination of the question for the adjudication of which this suit was authorized to be instituted in the name of the United States." (Rec. 46.)

Comparing the value of these islands with the value of the 9.10¾ acres of land covered by the patent, he says,

"That shore land was of large value compared with these two insignificant islands."

"It is so much larger that these two islands sink into absolute insignificance." (Rec. 67.)

Stradley, the only witness called by the complainant to prove the value of the islands, testified that the value of the

two islands together was $50,000, though he would not put any separate value on either one alone. To the question,

"In what does their value consist?"

he answered,

"The strategic position with reference to water power." (Rec. 209.)

Q. "What do you think the man that bought it for $50,000 would want of them?"

A. "That would be his business." (Rec. 210.)

Mr. De Young, an engineer in the employ of the United States at the Soo, testified in behalf of the defendant that the islands were comparatively valueless for commercial purposes. (Rec. 268.)

On September 4, 1902, the Commissioner of the General Land Office sent to the Secretary of the Interior a statement made to him by the Chief of Engineers. It said, respecting the value of these islands,

"They are valuable mainly because of their partial control of water power privileges or rights in the rapids; such value being of less importance, however, to the United States than to others, because it can obtain all the water power it desires from its own canal." (Rec. 193.)

Mr. Chandler, substantially a defendant, testified,

Q. "What is the property value, in your judgment, of Islands one and two?"

A. "Considered as the islands themselves, practically nothing."

Q. "Considered with reference to other property?"

A. "Considered in relation to the improvement of the water powers by the riparian owner, they would be of considerable value, either to the owner for the further improvement of the water power, or against him, in restricting the development." (Rec. 273.)

The fall against the defendant's mainland above the head of Island No. 1 is about four feet. The fall against Island No. 1 is a little more than six inches. And the extreme length of Island No. 1 is one hundred and nine feet. The fall between the foot of Island No. 1 and the head of Island No. 2 is about four inches. And the distance with the stream is about seventy-three feet. The fall against Island No. 2 is about two feet

and ten inches (Rec. 264), and the distance about three hundred and forty-eight feet. (Rec. 266.) The fall below Island No. 2 is about one foot. De Young's Table of Observation. (Rec. 264-5-6.)

The islands have no relation to the improvement of the stream for navigation. (Rec. 266-7-8, 293, 296. All maps showing location.)

## POSSESSION.

Respondent and its grantor, Chandler, patentee, were in possession of these islands from the issuing of the patent up to 1903. (Rec. 273-278, 283-284, 287, 294, 299-300, 305.)

In 1903, the appellant took, and the respondent yielded, such possession of them as to enable the United States to bring this suit. (Rec. 305.)

### International Boundary.

In continuing the boundary under Article 6 of the Treaty of Ghent, Mr. Porter was the American Commissioner, and Mr. Barclay the English Commissioner.

"Mr. Barclay also contended * * * that a line equidistant from the main shores was the true middle intended by the treaties describing the boundary, and it was, he said, the line which has been adopted, not only under Article 6, but also, under Article 7, so far as the commissioners have been able to agree."

Moore's International Arbitrations, Vol. 1, p. 177.

H. Ex. Doc. 451, 25th Cong., 2nd Sess.

Mr. Porter claimed that "Owing to the irregular and awkward shape of the river where it embraces that island (St. George's Island) it was impossible to trace an equidistant line, but there was another middle line, ascertainable on strictly scientific principles, which would effect a more sensible and practicable division of the area than a zigzag equidistant line. This was a line from a point in the center of the river, immediately above where it branches in order to pass the island, to another point in its center immediately below where the two

branches again unite, drawn in such a manner as to divide the whole space by the shortest and more direct route compatible with the object, into two equal quantities. Such a line would throw nearly three-fourths of the island into the United States." (Ib. Vol. 1, pp. 178-9.)

Opinion of Commissioners Porter and Barclay respecting the line through the St. Mary's Rapids.

"That is to say, beginning at a point in the middle of the St. Mary's River, about 1 mile above the head of St. George's or Sugar Island, and running thence easterly through the middle of said river, passing between the groups of islands and rocks which lie on the north side and those which lie on the south side of the Sault Ste. Marie as exhibited on the maps; thence through the middle of said river between Points Iroquois and Gros Cap, which are situated on the opposite main shores at the head of the River St. Mary's and at the entrance into Lake Superior; thence by a straight line through Lake Superior * * * " (Ib. Vol. 1, p. 185.)

## LANDS OMITTED FROM SURVEY.

When the United States survey purports to be completed at any place, and the surveyed lands are patented, no resurvey can be made except in case of omission through fraud or mistake. The title to omitted lands is in the patentee of adjoining parcels or in the state.

In considering this question, we find three classes of cases:

First. Where the lands omitted were islands.

Second. Where they were mainland.

Third. Where they were islands or mainland according to the stage of the water.

Each of the foregoing classes furnishes a great variety of facts and circumstances.

Little use can be made of one class in solution of cases of another class. But this general rule runs through all the cases: **when the United States survey purports to be completed** at any place, and the surveyed lands are patented, no re-survey can be made except in case of omission through fraud or mis-

take. With such exception, the title to omitted lands is in the patentee of the adjoining parcels, or in the State.

## AS TO ISLANDS.

The almost universal rule is that **unsurveyed islands**, between the bank and the middle thread of the river, not omitted from survey by fraud or mistake, **pass with the mainland** to the riparian patentee. (19.)

In R. R. vs. Butler the survey referred to Low Willow

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NOTE 19—U. S. vs. Stinson, 197 U. S., 200 (1905); (large island);
Whitaker vs. McBride, 197 U. S., 510, 514 (1905); (22 acre island);
Mitchell vs. Snale, 140 U. S., 406 (1891);
Railroad vs. Butler, 159 U. S., 87, 90, 95 (1895);
Butler vs. Railroad, 85 Mich., 255 (1891); (Low Willow Isle);
Chandos vs. Mack, 77 Wis., 573 (1890);
Granger vs. Avery, 64 Me., 292 (1874); (5 acre island in international river);
Pritchard vs. Middleton, 4 Ill., 510 (1842);
Church vs. Case, 122 Mich., 554 (1899); (18 acre island in lake not meandered);
McCullough vs. Wall, 4 S. C., 68, 82 (1850);
Gould on Waters, Sec. 77;
Railroad Co. vs. Railroad Co., 26 Minn., 31, 33 (1879);
Morgan vs. Reading, 11 Miss., 366 (1844);
Houck vs. Yates, 82 Ill., 179 (1876); (large island in Mississippi);
Franzini vs. Layland, 120 Wis., 72 (1903); (large island in Mississippi);
Webber vs. Axtell, 94 Minn., 375 (1905); (unsurveyed island in small lake).

Isle. Speaking of the decision of the Court below, Mr. Chief Justice Fuller said,

"The Court held that the well recognized rule in Michigan was * * * * that when the government has surveyed its lands along the bank of a river, and has sold and conveyed such lands by government subdivision, its patent conveys the title to all islands lying between the meander line and the middle thread of the river; unless previous to such patent it has surveyed such islands as governmental subdivisions or expressly reserves them when not surveyed." (91.)

Quoting from the Supreme Court of Michigan:

"In the present case there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey." (91-2.)

Quoting from Mitchell vs. Smale:

"Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formally by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey of 1834-5." (94-5.)

Further:

"We have no doubt upon the evidence that the circumstances were such, at the time of the survey, as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so-called Island No. 5 until 25 years after the survey of 1831, and nearly 20 years after that of 1837." (95.)

In Weber vs. Axtell, Justice Lovely said,

"If the island between the shore and the center of the lake when the patent was first issued was unsurveyed, without any expressed intention on the part of the government to treat it

as a portion of its dominion, it would accrue to the plaintiff." (380.)

**One reason** for the rule that insignificant, unsurveyed, islands and tongues of land pass by patent of the adjacent uplands is the **economic one**. The ownership of such islands or tongues of land is practically valueless when separated from the ownership of the mainland, while same is often of great value if united with ownership of mainland. Such ownership, separate from the ownership of mainlands, is of such value, and such value only, as the value of the hay to the "dog in the manger." The instant case is an emphatic illustration of this reason for the rule. (See diagram II herein. Also Rec. 207, 210, 273.)

The entire value of the islands in controversy lies in the power the ownership thereof gives to interfere with, or aid in, the development of the hydraulic power by the riparian. (Rec. 46, 209-0, 268, 273, Diagram II.)

Diagram II shows how the power of the fall is wasted by separating the ownership of the islands and adjacent subaqueous lands, from that of the mainland and adjacent subaqueous lands.

**The logical, underlying reason** of this rule is that the title to unsurveyed islands goes with, and is part of, the subaqueous lands,—that the United States treats them as part of such subaqueous lands, and relinquishes to the State all proprietary interest therein, and the State in turn relinquishes them to the riparian. (20).

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NOTE 20—Grand Rapids & Ind. R. R. Co. vs. Butler, 159 U. S., 87, 88 (1895);
Franzini vs. Layland, 120 Wis., 72, 81-2-3 (1903);
Webber vs. Axtell, 94 Minn., 375 (1905);
McCullough vs. Wall, 4 S. C., 68, 82 (1852);
Trustees vs. Dickinson, 63 Mass., 544-5, 548-9 (1852);
Deerfield vs. Arms, 34 Mass., 41 (1835).

Chandler Tract, inc

Scale of Whelpl

1 to 2112.

Distance from a to b is

" " b " c "

" " c " d "

" " d " e "

" " a " f "

W.

a

S 8°56W 8.09

54°32'E 100

S 77° 10'E

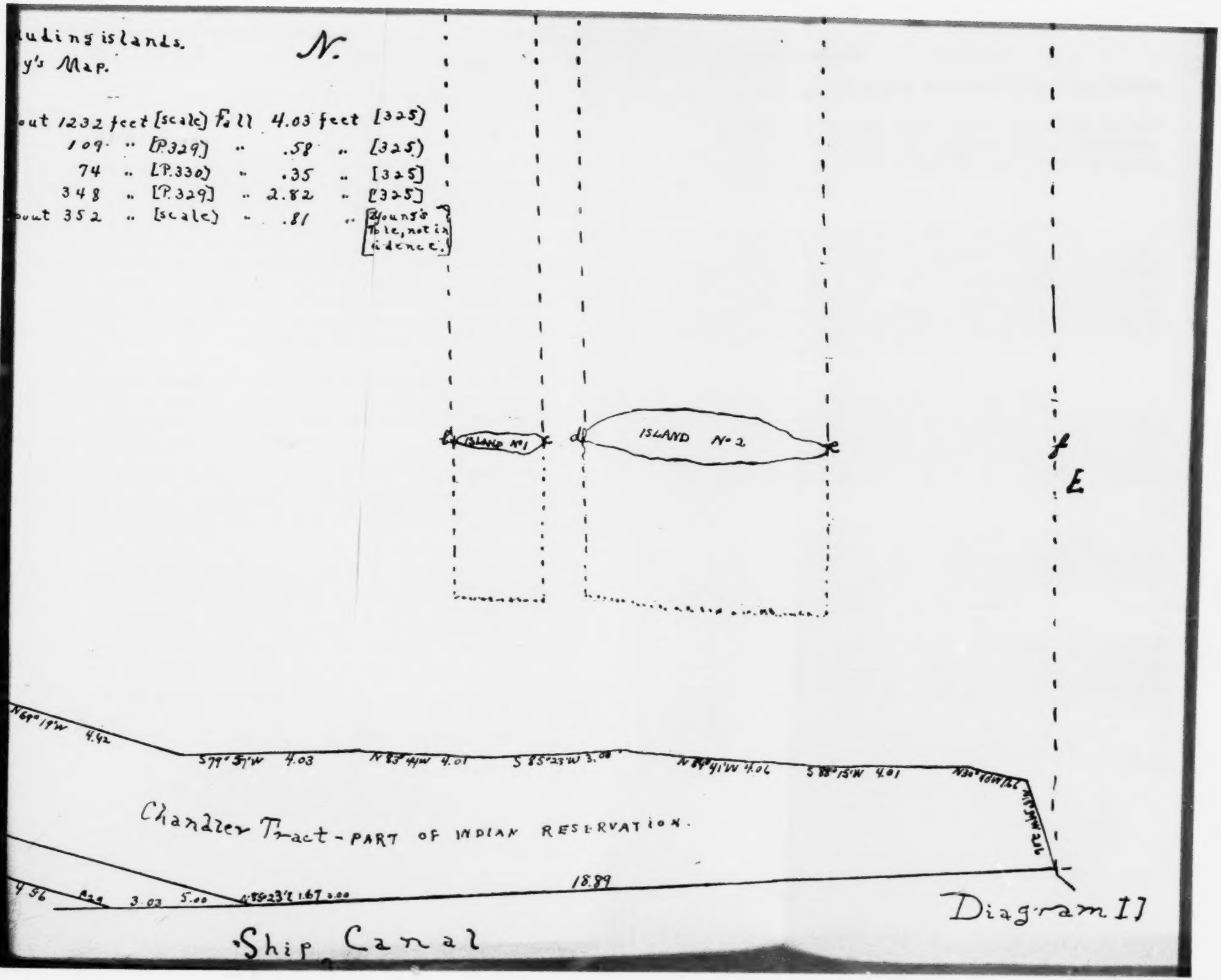
105

Portage Street

1500

160

9.65


uding islands.
y's Map.
N.
out 1232 feet [scale] Fall 4.03 feet [325]
109 " [P.329] " .58 " [325]
74 " [P.330] " .35 " [325]
348 " [P.329] " 2.82 " [325]
out 352 " [scale] " .81 " [Young's Table, not in evidence.]
ISLAND No 1
ISLAND No 2
E
N69°19'W 4.42
S79°31'W 4.03
N83°44'W 4.01
S85°23'W 3.08
N84°41'W 4.06
S88°15'W 4.01
N35°10'W 22
Chandler Tract - PART OF INDIAN RESERVATION.
18.89
4.56
3.03
5.00
S89°23'E 1.67 3.00
Ship Canal
Diagram I]

ISLANDS APPURTENANT

In Grand Rapids & Ind. R. R. Co. vs. Butler, Chief Justice Fuller said,

"Butler derived title under Lyon and Hastings, and claimed the land in dispute by virtue of riparian ownership, as taking, under the laws of Michigan, the bed of the stream to the thread thereof." (88.)

In Franzini vs. Layland, Justice Marshall said,

"As regards the original proprietor, the general government, the omission to take notice of the existence of an island in making the public land surveys, and approval of the survey by sovereign authority, evidences that the omitted land was intended to pass as an incident of the land it lies opposite of, and is appurtenant to it, if to any. (83.)

In Webber vs. Axtell, Justice Lovely said,

"As to this small island, at the time of the government survey and patent to plaintiff, the government of the United States made no claim, but treated it as the bed of the lake, which belonged to the state, subject to the rights of riparian owners." (381.)

In McCullough vs. Wall, Chancellor Dargan said,

"But islands in rivers, like rocks, (which are only small islands) fall under the same rules concerning ownership which apply to the soil covered by water." (82.)

The **proprietary right to the bed of the stream** being either in the riparian or in the state, this Court considers the **question of ownership by the riparian a question for each state to pass upon** through its legislature, or its Court of final resort. (21.)

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NOTE 21—Hardin vs. Jordan, 140 U. S., 371 (1891);
Kaukauna W. P. Co. vs. G. B. & M. C. Co., 142 U. S., 254, 271-2 (1891);
Barney vs. Keokuk, 94 U. S., 324, 338 (1876);
Packer vs. Bird, 137 U. S., 661, 669-70 (1891);
St. Louis vs. Rutz 138 U. S., 226, 242 (1891);
Mitchell vs. Smale, 140 U. S., 406 (1891);
Railroad vs. Illinois, 146 U. S., 387, 435 (1892);
Shively vs. Bowlby, 152 U. S., 1, 45-6 (1894).

Hardin vs. Jordan involved riparian rights and a consideration of the settled doctrine of Supreme Court of Illinois. Therein Mr. Justice Bradley said,

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie. The next question for consideration, therefore, is what is the law of Illonois with regard to such grants." (384.)

Mr. Justice Brewer said,

"Beyond all dispute, the settled law of this Court established by repeated decisions is, that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of its highest Court, furnish the best and final authority." (402.)

Kaukauna W. P. Co. vs. G. B. & M. C. Co. involved the question of riparian ownership of subaqueous lands. Therein, Mr. Justice Brown said,

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. * * * * With respect to such rights, we have held that the law of the State, as declared by the Supreme Court, is controlling as a rule of property." (271-2.)

Mr. Justice Shiras truly said in his dissenting opinion in Scranton vs. Wheeler,

"Riparian rights when recognized as existing by the laws of the State are a valuable property and the subject of compensation when taken for public use." (179 U. S., 141 at 178-9.)

This case related to St. Mary's River.

To now reverse the doctrine of the Michigan decisions

would be, as Mr. Justice Bradley said in Hardin vs. Jordan: "It is too much like judicial legislation. It is as much as to say, 'We think the common law might be improved and we will therefore improve it.'" (397.)

## Michigan Rule.

In Michigan, the riparian, under patent of the United States, owns the bed of the river to the middle thread thereof. (22.)

In Grand Rapids vs. Butler, Chief Justice Fuller said,

"In Michigan the common law prevails, and the rule is sustained by an unbroken line of authorities that a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof." (93-4.)

Kemp vs. Stradley involved riparian lands on St. Mary's River. Justice Hooker commences his opinion thus:

"The complainant owning lands to the center of the Sault Ste. Marie River on both sides of a city street, built docks extending some distance into the stream in front of his entire premises." (676.)

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NOTE 22—Ryan vs. Brown, 18 Mich., 196, 208-9-10 (1869);
Bay City Gas Light Company vs. Industrial Works, 28 Mich., 182 (1873);
Attorney General vs. Booming Co., 34 Mich., 463; (1876);
Backus vs. Detroit, 49 Mich., 110 (1882);
Turner vs. Holland, 65 Mich., 453 (1887);
Grand Rapids vs. Powers, 89 Mich., 94 (1891);
People vs. Silberwood, 110 Mich., 103, 106-7 (1896);
Brown vs. Parker, 127 Mich., 391, 392 (1901);
Grand Rapids R. R. vs. Butler, 159 U. S., 87 (1895);
Kemp vs. Stradley, 134 Mich., 676 (1903).

In connection with the Michigan cases, see Michigan Constitution of 1850, Article XX, Schedule Sec. 1,

"The common law and the statute law now in force * * * shall remain in force until they * * * are altered or repealed by the legislature." Compiled Laws Mich., V. 1, p. 129.

There are no two opinions respecting the common-law rule of ownership by riparian of subaqueous land on non-tidal rivers. A late and full exposition of the rule for states where the common law is adopted by statute, or constitution, is found in Kinkead vs. Turgeon, (Neb.) 109 N. W. R. 744, a well considered case involving an interstate river.

Counsel claim that No. 112 Public Acts of Michigan, 1895, "recognizes the public ownership of the lands under the Great Lakes and their connecting waters."

The language of the title may tend to support such inference. But the language of the act itself, not only does not support, but forbids the inference.

It sets apart and dedicates for shooting grounds,

"that part of Lake Erie lying adjacent to the surveyed lands of Monroe and Wayne Counties, and any submerged lands within the surveyed lines of said counties and connected with Lake Erie and Detroit River, **providing such surveyed lands are owned by the state of Michigan.**"

Attention has been called to section 6797, Compiled Laws of Michigan, authorizing such corporations as the M. L. S. P. Co.,

"Third, to divert into any canal * * waters from Lake Superior or St. Mary's River." This section 6797 is act No. 39, Laws of Michigan for 1883.

(a) Attorney General Oren gave the M. L. S. Po. Co. an opinion respecting this act, on March 14, 1899, wherein he said,

"You have also asked me for my opinion upon the question of whether your right to divert water into and through your canal would be subject to any other restriction than that

imposed by the navigation clause of the United States constitution. * * * It would be presumed that the grant that you received from the state through your corporate articles was a right that was subject to be exercised in such a way as not to interfere with any private ownership that might be had in the fall of water over the rapids. This, however, would be entirely a matter of adjustment between your company and the owners of riparian rights at the rapids." (Report of Atty. Gen. Mich., 1899, p. 110.)

(b) There are no limitations to the alleged legislative grant to divert the waters of St. Mary's River specified in the act. But we must of necessity imply three limitations—Canadian rights, navigation rights and riparian rights. The implication relating to the riparian rights is as imperative as that relating to the other rights.

(c) If the act be construed to declare title to the subaqueous lands to be in the State, then, as against a prior patentee, the act is void. When a rule of property has been established by judicial decision, it is not competent to the legislature to change the rule so as to affect past transactions. The legislature may say what the law shall be, but not what it was. (23.)

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NOTE 23—Ogden vs. Blocklege, 5 U. S., 272 (1804);
Webster vs. Cooper, 55 U. S., 488 (1852);
U. S. vs. Klein, 80 U. S., 128 (1871);
Carlisle vs. U. S., 83 U. S., 147, 152 (1872);
Lambertson vs. Hogan, 2 Pa. St. 22, 25 (1845);
Forster vs. Forster, 129 Mass., 559 (1880);
Menges vs. Dentler, 33 Pa. St., 495, 498 (1859);
Haley vs. Philadelphia, 68 Pa. St., 45 (1871);
Orton vs. Noonan, 23 Wis., 102 (1868);
Nelson vs. Rountree, 23 Wis., 367 (1868);
Salters vs. Tobias, 3 Paige, 338 (1832);
Austin vs. Stevens, 24 Me., 520, 528-9-0 (1845);
Albertson vs. Landon, 42 Conn., 209, 211 (1875).

In Lambertson vs. Hogan, Justice Rogers said,

"Where it has been under judicial cognizance, no subsequent act of the legislature, whether it attempts the form of an explanaory act or whatever shape it may take * * * it cannot affect or change previous rights already fixed and settled. * * * It would be a libel on a co-ordinate branch of the government to suppose, without express words, they intended to commit so great and manifest injustice." (25.)

In Menges vs. Dentler, Chief Justice Lowrie said,

"The law which gives character to the case, and by which it is to be decided * * * is the law that is inherent in the case and constituted part of it when it arises as a complete transaction between the parties. If this law be changed or annulled the case is changed and justice denied and the due course of law violated." (498.)

In Haley vs. Philadelphia, Justice Sharswood said,

"An expository Act of Assembly is destitute of retroactive force because it is an act of judicial power, and is in controvention of the 9th section of the 9th article of the constitution which declares that no man can be deprived of his property 'unless by the judgment of his peers or the law of the land." (47.)

In U. S. vs. Klein, Mr. Chief Justice Chase said,

"Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." (145.)

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." (147.)

In Orton vs. Noonan, Chief Justice Dixon said,

"The act of 1866 * * * has no influence upon the question, for the very plain reason that the legislature has, under the constitution, no power to declare a deed valid which by law was void as between the parties to it at the time of the passage of the act." (104.)

MICHIGAN RULE

In Nelson vs. Rountree, Chief Justice Dixon said,

"The affidavit for the order of publication, * * * was fatally defective within former decisions on that subject, and the court acquired no jurisdiction. * * * There being, therefore, no judgment in this action, the question arises as to the effect of the last clause of section 1, chapter 409, Laws of 1865, which declares that 'all orders of publication heretofore or hereafter made * * * shall be evidence of the existence of such facts.' * * * It is a proposition not to be discussed at this day, that the legislature has no such power; and the court below, therefore, erred in the instruction given to the jury upon this question." (369-70.)

In Salters vs. Tobias, Chancellor Walworth said,

"In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law." (344.)

(d) The right to the flow of the water in the stream, and to its use for power, does not depend on the title to the subaqueous lands, but on the title to the bank. It is purely a riparian right. (See Ante. p. 10, Note 1.)

Hence an attempt on the part of the legislature to authorize the diversion of the stream does not, in any way, imply an assertion of title to the subaqueous lands. Such title has no relation to the right to divert the water.

(e) How does the passage of such act, under which the M. L. S. P. Co. claims the right to divert the waters of the St. Mary's River from the defendant's riparian lands, comport with counsel's statement in complaint relative to treaty obligations of the United States respecting the waters of the St. Mary's river:—that the same "shall be free and open to the use of the citizens and subjects of both countries." (Rec. 4.)

Ordinarily we say that "Sauce for the goose is sauce for the gander." But treaty obligations seem to be made of different stuff. When our client claims title to a couple of piles

of rock in the rapids at St. Mary's, they seem to be very unyielding. But when the M. L. S. P. Co. seeks to divert the waters of the St. Mary's River from our riparian lands into a private canal for water power purposes, treaty obligations seem to yield in a very accommodating way. Then it seems that "sauce for geese ain't jest the juice for ganders."

## Same Rule Applied to Interstate Rivers.

The riparian owns the subaqueous lands on the **Ohio River.** (24.)

The riparian owns the subaqueous lands on the **Mississippi River,** (25) which is, as said by Mr. Justice Bradley in Hardin vs. Jordan, "acknowledged to be one of the most important of navigable streams in the world." (387.)

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NOTE 24—Berry vs. Snyder, 66 Ky., 266, 283 (1867);
Miller vs. Hepburn, 71 Ky., 326 (1871;
Stanberry vs. Mallory, 101 Ky., 49, 52 (1897);
Town of Rovenswood vs. Flemings, 22 W. Va., 52 (1883).

NOTE 25—Jones vs. Soulard, 65 U. S., 41 (1860);
St. Louis vs. Myers, 113 U. S., 566-7 (1885);
St. Louis vs. Rutz, 138 U. S., 226 (1890);
Morgan vs. Reading, 11 Miss., 366, 369 (1844);
Franzini vs. Layland, 120 Wis., 72, 81 (1903);
Middletown vs. Pritcherd, 4 Ill., 510 (1842);
Houck vs. Yates, 82 Ill., 179 (1878);
Braxon vs. Bressler, 64 Ill., 488 (1872);
Cobb vs. Lavalle, 89 Ill., 331 (1878);
Lavalle vs. Shobell, 89 Ill., 370 (1878);
Ice Co. vs. Shortell, 101 Ill., 46 (1881);
Brooklyn vs. Smith, 104 Ill., 429, 438 (1882);
Schools vs. Schroll, 120 Ill., 509, 518-19 (1887);
People vs. Board of Supervisors, 125 Ill., 9 (1888);
Chicago vs. Van Ingen, 152 Ill., 624 (1894);
Trustees vs. McClure, 167 Ill., 23 (1897;
Magnolia vs. Marshall, 39 Miss., 109; (1860).

INTERSTATE RULE

In Jones vs. Soulard, Mr. Justice Catron said,

"We think this is a general rule too well settled as part of American and English law of real property to be open to discussion, and the inquiry here is whether the rule applies to so great and public a water course as the Mississippi is at the city of St. Louis. * * * The doctrine that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark has no application in this case. Nor does the size of the river alter the rule. To hold that it did would be dangerous tampering with riparian rights involving litigation concerning the size of rivers as a matter of fact rather than proceeding on established principles of law." (65.)

In St. Louis vs. Rutz, Mr. Justice Blatchford said,

The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois. * * * The Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river." (242.)

Same as to the **Chattahoochee River**. (26.)

**Interstate** rivers are **International** rivers.

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NOTE 26—Young vs. Harrison, 6 Ga., 130 (1849);
Jones vs. Water Lot Co., 18 Ga., 539 (1855);
Moses vs. Eagle Mfg. Co., 62 Ga., 455 (1879);
Cook vs. Winter, 68 Ga., 259 (1881).

NOTE 27—Nebraska vs. Iowa, 143 U. S., 358, 361 (1892);
Indiana vs. Kentucky, 136 U. S., 479, 506 (1890);
Handley's Lessee vs. Anthony, 18 U. S., 374, 379 (1820);
Rhode Island vs. Massachusetts, 37 U. S., 657, 720 (1838);
Alabama vs. Georgia, 64 U. S., 505, 512-3-4 (1859);
Opinions of Attorneys General, Volume 8, 175-6-7.

In Nebraska vs. Iowa, Mr. Justice Brewer said,

"These propositions * * * are in like manner recognized where the boundaries between states or nations are by prescription or treaty formed in running water." (361.)

In Handley's Lessee vs. Anthony, Mr. Chief Justice Marshall said,

"When a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream." (379.)

In Rhode Island vs. Massachusetts, Mr. Justice Baldwin said,

"Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this Court, through a long series of years and cases, to the present term." (720.)

In Alabama vs. Georgia, Mr. Justice Wayne said:

"The contract of cession must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe." (512-3.)

"Chief Justice Marshall says the shore of a river borders on the water's edge; and the rule of law, as declared by the court in 5 Wheat., 379, is, that when a great river is a boundary between two nations or States, if the original property is not in either and there be no convention about it, each holds to the middle of the stream." (513-4.)

INTERNATIONAL RULE

**Same Rule as to International Rivers.** (28.)

Some of the Atlantic states have, by legislation "to benefit commerce," extended the rule of the riparian ownership of subaqueous land to tide waters, arms of the sea. (28a.)

NEW YORK RULE

The **Inferior Courts of New York** have held that the riparian owner on international rivers did not own the subaqueous lands. It appears to have been so held in Kingman vs. Sparrow (12 Barbour, 201 at 206). But in this case the question did not arise. (205-6.)

Later, this rule was distinctly held by Commissioners of Appraisal in State Reservation at Niagara, (16 Abbots New Cases, 159). Appeal was taken from this decision of the Commissioners to the Supreme Court at general term, and the decision of the Commissioners was sustained, (Id. 395, 37 Hun.

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NOTE 28—Cases on **Detroit River.**
Lorman vs. Benson, 8 Mich., 18 (1860);
Rice vs. Ruddiman, 10 Mich., 125, 141-2 (1862);
Clark vs. Campau, 19 Mich., 325 (1869);
Backus vs. Detroit, 49 Mich., 110, 115 (1882);
Hall vs. Alford, 114 Mich., 165, 167 (1897);
Commissioners vs. Detroit, 117 Mich., 458, 462 (1898).
Cases on **St. Mary's River.**
Ryan vs. Brown, 18 Mich., 196, 207 (1860);
Scranton vs. Wheeler, 113 Mich., 565, 567 (1897);
Scranton vs. Wheeler, 179 U. S., 141, 163 (1900);
Sherwood vs. Land Commissioners, 113 Mich., 227-8 (1897);
Kemp vs. Stradley, 134 Mich., 676.
Cases on **St. Croix River.**
Granger vs. Avery, 64 Me., 292, 295 (1874).

NOTE 28a—Acts of Florida, 1856, p. 25;
Geiger vs. Filor, 8 Fla., 325, 339-0 (1859);
Chap. 9, Laws of Maryland, 1745;
Also Chap. 4, Laws of Maryland, 1773;
Hammonds vs. Inloes, 4 Md., 138 at 170 (1853).

437), on the ground that the Niagara River was a public river, navigable in fact, and an International boundary. The Court said at page 547 (37 Hun.),

"The line between the United States and Canada is located in the center of the Niagara River * * * and we think because it is navigable in fact, and constitutes the natural boundary between this and another country, is the reason why the proprietary right, from its margin to such boundary line, is in the State; and that the riparian owners have taken, by the grant referred to, only to the water's edge of the stream."

Nowhere in these cases is there given any reason why the riparian on an International river should not have the same proprietary interest in the subaqueous lands as the riparian on any other public or navigable river. The fact that it is an International river is stated as though it were a reason why there should be a difference. But we cannot see wherein this fact is a reason. Where the boundary between nations is upon land there seems to be no reason why the citizens of the respective nations shall not own the land to the boundary line. What different reason applies where the land is subaqueous, conditioned only that the State or nation has control of the waters for all public purposes?

The decisions of the New York Courts on the question of riparian ownership of subaqueous lands in the public and navigable rivers of the State seem to have been as shifting as the sands of the sea.

The earlier doctrine of the New York cases was that the riparian on small rivers did, but on great rivers did not, own the subaqueous lands. (29.) At the same time it was held

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NOTE 29—Palmer vs. Mulligan, 3 Caines, 308 (1805);
Canal Appraisers vs. People, 17 Wend., 572 (1836);
People vs. Tibbetts, 19 N. Y., 523, 528 (1859);
People vs. Canal Appraisers, 33 N. Y., 461 (1865);
Hooker vs. Cummings, 20 Johns., 90, 99 (1822);
Ex parte Jennings, 6 Cow., 518, 537 (1826);
Rogers vs. Jones, 1 Wend., 237, 255-6 (1828);
Com'rs vs. Kempshall, 26 Wend., 404 (1841);
Varick vs. Smith, 9 Paige, 547, 566-7 (1842);
Clinton vs. Myers, 46 N. Y., 511 (1871).

that the same reasoning as to riparian ownership of subaqueous lands did not apply to international rivers as to the other rivers of the state. (30.) Later it was held that the riparian owner did own subaqueous lands on the navigable rivers, small and large, of the state, but not upon the Hudson River and the Mohawk River and interstate rivers. (31.)

The case, Commissioners of State Reservation, would probably have been carried to a higher court, but for the reason that such appeal was forbidden by the statute providing for the condemnation proceedings. (37 Hun. 541.)

Respecting the position of the New York Courts, Justice Robertson said,

"After a long and varying conflict among her Courts and most eminent jurists, New York, which has decided both ways, seems at last, by its latest decisions, to have followed the common law, but with exceptions and qualifications which neutralize her authority; for her Courts have sustained, against riparian claims, grants of islands in, and beds under, some of her navigable rivers, and without dissent, have adjudged that riparian owners on the lakes, and even the Niagara River, where there is no tide-water, have no title beyond the banks." (Berry vs. Snyder, 66 Ky., 266 at 290-1.)

## SUBSEQUENT SURVEYS.

Except in case of omission by accident or mistake, the United States has no authority to make surveys subsequent to

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NOTE 30—Canal Appraisers vs. People, 17 Wend., 572, 598, 623 (1836).

NOTE 31—Chenango Bridge Co. vs. Paige, 83 N. Y., 178, 184 (1880);
Smith vs. Rochester, 92 N. Y., 463, 479, 481-2-3 (1883).

patent of any land between the meandered line and the middle thread of the stream. (32.)

In R. R. Co. vs. Schurmeir, Mr. Justice Clifford said,

"Argument is scarcely necessary to show, in view of the definite regulations of Congress upon the subject of the survey and sale of the public lands, that the second survey of the space between block twenty-nine and the main channel of the river, cannot affect the title of the complainant as acquired from the United States under the antecedent official survey and sale.' (289.)

In Mitchell vs. Smale, Mr. Justice Bradley said,

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. * * * * Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment. * * * * We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which

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NOTE 32—R. R. Co. vs. Schurmeir, 74 U. S., 272, 289 (1868);
Hardin vs. Jordan, 140 U. S., 371, 383 (1891);
Mitchell vs. Smale, 140 U. S., 406, 412-3 (1891);
Moore vs. Robbins, 96 U. S., 530, 533 (1877);
Davis vs. Weibbold, 139 U. S,. 507 (1891);
Gr. Rapids vs. Butler, 159 U. S., 87 (1895);
Smelting Co. vs. Kemp, 104 U. S., 636, 646 (1881);
Lindsey vs. Hawes, 67 U. S., 554, 560-1 (1862);
Cragin vs. Powell, 128 U. S., 691 (1888);
Webber vs. Boom Co., 62 Mich., 626, 635 (1886);
Shufeldt vs. Spaulding, 37 Wis., 662 (1875);
State vs. Shooting Club, 127 Mich., 580, 587 (1901);
Stoner vs. Rice, 121 Ind., 51, 56 (1889);
McCormick vs. Huse, 78 Ill., 363, 373-4 (1875);
Railroad vs. Railroad, 26 Minn., 31-34 (1879);
Webber vs. Axtell, 94 Minn., 375 (1905).

case the government would have the right to recall the survey, and have it corrected by the Courts, or in some other way."

In Moore vs. Robbins, Mr. Justice Miller said,

"But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. * * * * If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership, which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land-office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title." (533-4.)

In **Hardin vs. Jordan**, notice had been given to the holder of the older patent of application for survey of (claimed) unsurveyed lands. The Secretary of the Interior had determined "the right of the government to survey, and grant the land." Mr. Justice Bradley said,

"If the lands had been previously disposed of, the department had no jurisdiction over them, and the question whether they have or have not been previously disposed of is a judicial question and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions." (401.)

## SIZE OF RIVER.

The **size of the river** has no logical bearing upon the question. (33.)

In Jones vs. Soulard, Mr. Justice Catron said,

"The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case; nor does the size of the river alter the rule. To hold that it did, would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matters of fact, rather than proceeding on established principles of law." (65.)

In Jeffries vs. East Omaha Land Co., Mr. Justice Blatchford said, referring to Jones vs. Soulard,

"It was held that a riparian proprietor on the Mississippi River at St. Louis was entitled as such, to all accretions as far out as the middle thread of the stream; and that the rule, well established as to fresh-water rivers generally, was not varied by the circumstances that the Mississippi at St. Louis is a great and public waterlcourse. * * * * * Nor did the size of the river alter the rule." (190.)

In Franzini vs. Layland, Justice Marshall said,

"Appellants' counsel further contend that the rule which generally prevails in this state, * * * should not apply to large rivers like the Mississippi. No authority is cited to support such contention, and we venture to say that none exists. The authorities are distinctly to the effect that no discrimination can reasonably be made on account of the size of rivers." (81.)

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NOTE 33—Jones vs. Soulard, 65 U. S., 41 (1860);
Jeffries vs. East Omaha Land Company, 134 U. S., 178 (1890);
Franzini vs. Layland, 120 Wis., 72 (1903);
Morgan vs. Reading, 11 Miss., 366 (1844).

In Morgan vs. Reading, Chief Justice Sharkey said,

"It seems that the common law rule admits of no modification in consequence of the magnitude of a river." (403.)

## FRAUD OR MISTAKE.

These islands were not omitted from survey by **mistake or fraud.** They appear on the plat of the ordinary U. S. Survey of 1845. (Comp. Ex. "A"). They also appear on the Whelpley Map. (Ex. "E" or 23). Whelpley made triangulations to them from his base line. Neither Whelpley nor Mullett surveyed either of them.

If surveyed, they would have been subject to pre-emption entry and patent at $1.25 per acre, or less than $2.00 for both. Complaint states area of both islands at 1.45 acres. (Comp. Rec. p. 1, Par. II.) This is much less than survey would have cost. Inclusion in, not omission from, survey would have been a fraud.

Mullett's contract for survey, dated 2nd April, 1845, provided for a survey of "all those townships and fractional townships situated in the east point or upper peninsula of Michigan, which lie east of the upper margin and north of Lake Huron, including all the adjacent islands within the territorial limits of the United States, and **excluding** such islands and other lands as are, or may be, reserved for the Indians or for other purposes." (Exhibit 10, Rec. p. 128.)

Instructions Surveyor General to Deputy Mullett say,

"The greater part of this district is fractional townships on Lake Huron and on the Straits of St. Mary, embracing Drummonds, Sailors, Marquette, LaSalle and a great number of smaller islands. All these you will survey, connecting them by intersections or otherwise with the work on the main." (Rec. p. 130.)

This, of course, related to such islands as were then deemed worth surveying. Certainly such instructions cannot be construed to relate to every boulder or rocky knob sticking out of water.

That the **deputy so construed the instructions** appears from the fact that he surveyed the larger islands, and simply noted on his field notes the position of those deemed too small to be surveyed.

The **Surveyor General so understood the matter.** He approved the survey and caused the islands to be noted on the plats made in his office, showing the survey of the larger ones, and the position and approximate size of those not surveyed. (Comp. Ex. "A"). These plats were also approved by acquiescence of General Land Office. Exhibit "A" shows many unsurveyed, and many surveyed, islands. The area of smallest surveyed island, shown by this exhibit, is 3.90 acres, or just about three times the area of Island No. 2, the larger island herein involved.

## MEANDER LINE.

The **unusual description** in the Patent aids the view that same carries title to the subaqueous land and the islands.

The same bounds the mainland "by the River St. Mary on the east, north and west." Bounding "by the river" means by the middle thread of the river. Practically all cases hold this rule.

The further boundary by course and distance, of the meander line of Whelpley's Survey, does not weaken the argument.

The meander line is, by presumption of law, imported into every patent of public lands bordering on a water course. (34.)

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NOTE 34—Cragin vs. Powell, 128 U. S., 691 (1888);
United States vs. Texas, 162 U. S., 1 at 5 (1896);
Jeffries vs. East Omaha Land Company( 134 U. S., 178 at 194-5 (1890);
Shufeldt vs. Spaulding, et al., 37 Wis., 662 at 668 (1875);
Whitney vs. Detroit Lumber Co., 78 Wis., 240 at 246 (1890);
Hardin vs. Jordan, 140 U. S., 371 at 380 (1891).

MEANDER LINE

In Cragin vs. Powell, Mr. Justice Lamar said,

"It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." (696.)

But the **meander line is held not to limit the grant.** It only determines area. (35.)

The office of, and method of fixing, the meander line is clearly indicated by the following instructions of the Commissioner of the General Land Office:

Instructions of 1890.

"Meander lines should not be established at the segregation line between dry and swamp or overflowed land, but at the ordinary **low water mark** of the actual margin of the rivers or lakes on which such swamp or overflowed lands border. In cases where such meander lines were formerly established at the segregation line between dry and swamp or overflowed lands new and proper meander lines may be established under the direction of the Surveyor General and the township and section lines extended over such swamp or overflowed lands and the corners established, as hereinbefore provided, in order that the plats and field notes of surveys may show the actual facts in the case." (P. 34.)

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NOTE 35—Hardin vs. Jordan, 140 U. S., 371 at 380 (1891);
Whitaker vs. McBride, 197 U. S., 510 at 512 (1905);
Railroad vs. Schurmeir, 74 U. S., 272 (1868);
Schools vs. Risley, 77 U. S., 91 at 110 (1869);
Yates vs. Milwaukee, 77 U. S., 497 at 504 (1870);
Bates vs. Railroad, 66 U. S., 204 (1861);
Grand Rapids vs. Powers, 89 Mich., 94 at 102-3-4-5 (1891);
Ryan vs. Brown, 18 Mich., 196 at 208-9-10 (1869).

Instructions of 1894.

"4. Meander lines will not be established at the segregation line between dry and swamp or overflowed land, but at the **ordinary high water mark** of the actual margin of the rivers or lakes on which such swamp or overflowed lands border." (P. 57.)

Further to this point, see Fuller vs. Dauphin, 124 Ill., 542,

"and in running meander lines the government surveyors always seem to have kept along the higher, dry banks, and not to have waded or gone over the low, wet peninsulas or little islands near the shore." (543.)

Parties purchasing property, shown by the United States surveys and plats to be riparian property, should not be **excluded from the water front.** (36.)

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NOTE 36—R. R. vs. Schurmeir, 74 U. S., 272 (1868);
Land Co. vs. Sanders, 103 U. S., 316, 319 (1880);
Bates vs. R. R., 66 U. S., 204 (1861);
Lindsay vs. Hawes, 67 U. S., 554 (1862);
St. Claire vs. Livingston, 90 U. S., 46, 63 (1874);
Brown vs. Huger, 62 U. S., 305 (1858);
Hardin vs. Jordan, 140 U. S., 371, 380 (1891);
Mitchell vs. Smale, 140 U. S., 406, 412-3-4 (1891);
Jeffries vs. East Omaha Land Co., 134 U. S., 178, 195-6-7 (1890);
(Read this in view of difference between meanders of Mullett's Survey and Whelpley's Survey.)
Cragin vs. Powell, 128 U. S., 691 (1888);
Boorman vs. Sunnuchs, 42 Wis., 233 (1877);
Wright vs. Day, 33 Wis., 260 at 264 (1873);
Watson vs. Peters, 26 Mich., 508, 517-8 (1873);
Richardson vs. Prentiss, 48 Mich., 88 at 91-2 (1882);
Ice & Coal Co. vs. Ice & Coal Co., 10[illegible]ch., 227, 236 (1894);
Horne vs. Smith, 159 U. S., 40 at 46 (1894);
Pierre Marquette Boom Co. vs. Adams, 44 Mich., 403 (1880);
Forsyth vs. Smale, 7 Biss. 201, Fed. Cases 4950 (1876).

MEANDER LINE

In Boorman vs. Sunnuchs, Justice Lyon said,

"Another rule applicable to this case is that if the meander line and the actual water line differ, the latter is the true line of a lot bounded in terms by the meander line. * * * We conclude, therefore, that the lots of the plaintiff extended to the pond, notwithstanding the line of the pond and the meander line as actually run and marked may differ." (243.)

In Watson vs. Peters, Justice Cooley said,

"And the rule itself is too valuable and too important to be varied by so immaterial a circumstance as that the boundary on the water is defined by a line instead of by making use of words which to the common understanding would convey the same meaning." * * * *

"If on the face of the plat, by reference to which the defendant bought, there was anything distinctly indicating an intent on the part of the proprietors to make this case exceptional and to reserve to themselves any rights in front of the water lots marked on it after they should have been sold, the case would be different." (517-8.)

In Richardson vs. Prentiss, Justice Marston said,

"It thus appears to be well established that the bank and the water are correlative, and that one cannot be owned without touching the other; that the bank is the principal object; so that when the law once fixes the proprietorship of that, the soil of the river follows as an incident; or, rather, (as it has been said), 'as part of the subject matter, **usque ad filum aquae.**'" (91.)

In Hardin vs. Jordan, Mr. Justice Bradley said,

"The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State Courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are those meandered; and that the waters themselves

constitute the real boundary. * * * It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain and to derogate from the value of natural boundaries, like streams and bodies of water." (380-1.)

Where lands are bounded by streams, and **monuments on the banks** are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument. (37.)

In Luce vs. Carley, Justice Cowen said,

"It is never thought that monuments mentioned in such a deed as occupying the bank of the river, are meant by the parties to stand on the precise water-line. They are used rather to fix the termini of the line which is described as following the sinuosities of the stream. * * * Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river * * * one-half the bed of the stream is included by construction of law." (453.)

In St. Clair vs. Livingston, Mr. Justice Swayne said,

"Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract." (63.)

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NOTE 37—Luce vs. Carley, 24 Wend., 451, 453 (1840);
Seneca National vs. Knight, 23 N. Y., 498 (1861);
St. Clair vs. Livingston, 90 U. S., 46, 63-4-5 (1874);
Cold Springs Iron Works vs. Tolland, 63 Mass., 492, 495-6 (1852);
Newton vs. Eddy, 23 Vt., 319 (1851);
McCullock vs. Aten, 2 Ohio 425 (308) (1823-6);
Handy vs. Anthony, 18 U. S., 375 at 380 (1820);
Buck vs. Squiers, 22 Vt., 484 at 494 (1850).

The iniquity of any different rule is thus spoken of by Justice Redfield, in Buck vs. Squiers,

"Its chief object is to prevent the existence of innumerable strips and gores of land along the margins of streams and highways to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one consequently not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up to vex and harass those who, in good faith, had supposed themselves secure from such embarrassment." (494.)

These mischiefs are well illustrated here. Complaint says of defendant's mainland that it is part of the Indian Reserve, but "does not extend to the northern boundary thereof, which is the Sraits of St. Mary, except at the easterly end, where it extends a considerable distance * * * into said strait." (Par. XIV, Rec. 15.)

In connection with this statement, observe the map showing the attempt of Mr. Wm. B. Cady, attorney of the M. L. S. P. Co., to enter a narrow strip, in shape of a shoe string, claimed by him to lie between Whelpley's meander and St. Mary's River. (Defts Ex. 21, Rec. 567-8. Also O'Hare's tracing of meanders.)

Respecting the supposed parcel, the Commissioner of the General Land Office said, as the fact is,

"The plat of survey shows no land between the shore line of St. Mary's River and the tract patented to Chandler (Rec. 573), such narrow strip not being represented upon any known map except the diagram filed by Mr. Cady with his application." (Rec. 573.)

**Complainant's counsel seem to have the view that the title to Islands one and two passes with, and by description of, the adjoining mainland.**

The complaint says,

"It was made the duty of the Secretary of War to direct the proper military officer to designate, or cause to be designated upon a map * * * * first, * * * * second, the position and extent of any other lot or lots which might be required for other public purposes; third * * * * and fourth * * * . The

Secretary of War caused to be so designated * * * * * the entire north fractional half of section six * * * such designation embracing said islands. * * * * On March 10, 1852, the Secretary of War transmitted said map to the Commissioner of the General Land Office * * * * " (Par. IX, Rec. 9-10.)

An examination of the map of March 10, 1852, shows no Islands one and two, although it included the space where said islands lie. (See Comp.'s Ex. 15.) The necessary inference is that the islands are within this designation on account that the same passed with the title to, and by the description of, the mainland.

The **United States itself** has proceeded upon the idea that proprietary ownership of subaqueous lands, to the middle thread of the stream, in the St. Mary's river, is in the owner of the mainland.

The United States, or an individual, being the owner of the mainland, and also adjacent islands, may separate the ownership of the islands from that of the mainlands. In such case, there is created a new thread of the stream between the mainland and the islands, and the owner of the island becomes the owner of the subaqueous land on each side of the island to the middle thread of each stream. (38.)

Claiming property (jus privatum) in Islands one and two, the United States forbade the defendant to extend its works beyond the middle thread of the stream between the mainland and the islands. (Rec. 285, 286, 304.) But it permitted the defendant to carry its works much further into the stream above the islands. (Rec. 269, 293, 302-3.)

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NOTE 38—Whitaker vs. McBride, 17 U. S., 510, 514 (1905);
West vs. Fox River Paper Co., 82 Wis., 647, 655 (1892);
Wiggenhorn vs. Kountz, 23 Neb., 690, 696 (1888);
Stolp vs. Hoyt, 44 Ill., 219, 223-5 (1867);
Warren vs. Westbrook Mfg. Co., 86 Me., 32, 36 (1893).

## TREATY OBLIGATIONS.

It is said that the treaty obligations of the United States forbid the application of the ordinary rule of riparian ownership of subaqueous lands to the St. Mary's River. And that, as to such river, such treaty obligations require that the property right in the subaqueous lands shall remain in the state of Michigan.

**First. Treaty Obligations Abandoned.**

The case comes to this Court on appeal from the Circuit Court of Appeals. Questions relative to treaty obligations are not within the jurisdictiion of that Court. If the United States intended to raise that question, the appeal should have been, from the Circuit Court, direct to this Court and not to the Circuit Court of Appeals. (Act March 3, 1891, Chap. 517, Sec. 5, 26 Stat. 828.) The act referred to provides in part,

"Sec. 5. That appeals or writs of error may be taken from * * the existing circuit courts direct to the Supreme Court in the following cases: * * * * *

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

* * * *

Sec. 6. That the circuit courts of appeals * * * shall exercise appellate jurisdiction to review * * * final decision * * * in the existing circuit courts in all cases other than those provided for in the preceding section of this act."

How can this court take jurisdiction of a question by appeal from a court which has no jurisdiction of the question? (39.) The stream can rise no higher than the fountain.

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NOTE 39 — Verbeck vs. Verbeck, 6 Wis. * 159, * 163;
Spaulding vs. Ry., 57 Wis., 304, 306-7;
Baker vs. State, 56 Wis., 568, 575;
Timmins vs. Bonner, 58 Tex., 554;
Mulder vs. Corlett, 54 Mich., 80;
Dunnington vs. Bailey, 27 Ark., 508;
Abernathy vs. Moore, 83 Mo., 65.

A court of review will not consider questions not raised or passed upon in the court below. (40. Much less will it consider questions which could not be raised or passed upon in the court below for want of jurisdiction. (41.)

It cannot be answered that appellee's remedy was to move to dismiss in the Circuit Court of Appeals. The question of treaty obligations was not raised by the assignment of errors on appeal to that court. (Rec. 69-70-1-2.) Appellee objected to consideration of same. (Brief, p. 100.) Herein the assignment of errors shows an attempt to raise such question. (Asgt. 14, Rec. 835.)

**Second. If Treaty Obligations Are to be Considered.**

Complaint says,

"The State of Michigan, as sovereign proprietor, in trust, of the subaqueous lands lying under the waters of said Strait of St. Mary to the southward of the international boundary established as hereinbefore set forth, has never had and has not now any right or power to convey, release relinquish or abandon the title so held by said State in trust for the public, but is entitled to hold, and is forever bound to hold, said subaqueous lands for the use and benefit of the public and to maintain the waters over them as public waters; and that said subaqueous lands are held by said State by the same right, and subject to the same trusts and limitations, which obtain at the common law as to the dominion and sovereignty over, and ownership of, lands under tide waters on the borders of the sea." (Par. V, Rec. 4-5.)

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NOTE 40—Walker vs. Sauvinett, 92 U. S., 90 (1875);
Cooley vs. Gillan, 54 Conn., 80 (1886);
Moody vs. Clark, 27 Me., 551 (1847);
Swecker vs. Swecker, 87 Va., 305 (1890);
Newcomb vs. Wood, 97 U. S., 581, 583 (1877);
Bogert vs. Phelps, 14 Wis., 88, 94 (1861);
Congar vs. Chamberlain, 14 Wis., 258, 262 (1861).

NOTE 41—Cary Mfg. Co. vs. Acme Co., 187 U. S. 427-8 (1902);
Ayres vs. Polsdorfer, 187 U. S., 585, 590-1-2 (1902);
Robinson vs. Caldwell, 165 U. S., 359, 362 (1896);
Refining Co. vs. New Orleans, 181 U. S., 277 (1900).

TREATY OBLIGATIONS

It is not plain to us what treaty obligations affect the question.

Complaint states (Rec. 4) that, by the **Webster Ashburton** treaty, (August 9, 1842, 8 Stat. 572),

"It was agreed between said contracting nations that all the water communications along the line so established shall be free and open to the use of the citizens and subjects of both countries."

We find no such provision in said treaty relating to the St. Mary's River. But we do find such provision relating to "the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage from the shore of Lake Superior to the Pigeon River as now actually used." Last part Article II.

Also,

"It is agreed that where, by the provision of the present treaty, the River St. John is declared to be the line of boundary, the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either." Article III.

Also,

"It is further agreed that the channels of the River St. Lawrence, on both sides of the long Sault Island, and the Barnhart Island, and the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair, with the lake of that name, shall be equally free and open to the ships and vessels and boats of both parties." Article VII.

The St. Mary's River seems to have been omitted from such agreement on account that it was not by nature navigable, but only floatable, and as to it no such provision seemed to the commissioners to be useful. The specific agreement as to each other river seems to emphasize the omission of this. It was then evident to the commissioners that the St. Mary's Rapids, and Niagara Falls, must be overcome by slack water navigation, in which case the water must be withdrawn into

canals within territory of one or other or both countries, as the event has proven.

That the Webster Ashburton treaty was not understood to provide that the water communications along the line so established "shall be free and open to the use of the citizens and subjects of both countries," except so far as therein specially provided, appears plainly from article 4 of treaty of June 5, 1854, (10 Stat. 1091) and especially that provision thereof that "the United States further engages to urge upon the State Governments to secure to the subjects of her Britannic Majesty the use of the several State canals, on terms of equality with the inhabitants of the United States." Probably this clause had especial reference to the Sault Ste. Marie Canal then in process of construction by Michigan.

To same effect is treaty of May 8, 1871.

**Both governments have acted contrary to such view.** Each has authorized the withdrawal of the waters of the river from the bed thereof into private canals within its territory for use for power. (Act Cong. June 13, 1902, 32 Stat. 361. Act Ontario, Rec. 332.)

Each has withdrawn the waters from the bed into canals within its own territory for use for navigation. And the United States has forbidden the use of its canal to the Canadian government. (Chicora incident, Rec. 338.)

Neither is it plain to us how or why any treaty obligation of the United States requires that the property right of the subaqueous lands shall remain in the state of Michigan. If the claim was that the property right in such lands must remain in the United States, the claim might appear less shadowy. But it is conceded that no such property right rests in the United States, nor any right except such as rests upon the constitutional power of the United States. (Comp. Rec. 3.)

If the property right to the subaqueous lands vested in the

riparian was absolute and unqualified, the claim would seem less shadowy. But the cases holding that the property right in the subaqueous lands is in the riparian, hold, substantially without exception, that such property right of the riparian is subordinate to all rights of the state and of the United States for public uses. (42.)

In Willow River Club vs. Wade, Justice Marshall said,

"To recapitulate in closing, the title to the beds of all navigable waters in this state was in the state originally in trust for public purposes, the same as the beds of streams navigable at common law; the state not only never has, but never can, legally abdicate that trust, or surrender such title, except subject to all public uses for which it was created; and while it is true that the title to the beds of such streams is in the adjoining landowners by implication of law, it is just as true that such title is subject to the public character of the waters, the same as if no surrender of title had ever taken place." (117.)

**If Patentee is Not the Owner, Michigan Is.**

The governmental title to the bed of the St. Mary's passed from the United States on the admission of Michigan as a state. (Comp. Par. III, Rec. 2, 3.) The complaint recites that

"thereafter on January 26, 1837, the state of Michigan was * * * erected * * * whereby the state of Michigan succeeded to the sovereignty over the land and water embraced within its borders, which included said islands Nos. one and two and the mainland immediately to the south thereof, and whereby the state of Michigan succeeded to the proprietorship in trust for the people of said state, and for the citizens of the United

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NOTE 42—Scranton vs. Wheeler, 179 U. S., 141 (1900);
Gibson vs. United States, 166 U. S., 269 (1897);
Scranton vs. Wheeler, 113 Mich., 565 (1897);
Franzini vs. Layland, 120 Wis., 72 at 81 (1903);
Willow River Club vs. Wade, 100 Wis., 86 at 117 (1898).

States and the public in general * * * of the subaqueous lands under the waters of said Strait of St. Mary, through which passes a commerce of enormous volume and value."

To this effect as to **jus publicum** are all the cases.

On the admission of Michigan as a state, and the making of patent of the adjacent mainland, the property right in the subaqueous lands passed from the United States to either the state of Michigan or the patentee. After making the patent, neither the governmental title, nor the proprietary title, neither the **jus publicum,** nor the **jus privatum,** in the subaqueous lands, remained in the United States, except so far as necessary to enable it to carry out its constitutional obligations, which, of course, included treaty obligations.

If the state has power to relinquish the proprietary interest in subaqueous lands in St. Mary's River to the riparian, defendant owns islands one and two. But if, as complainant says, the State cannot so relinquish the proprietary interest, then the State owns them.

If public policy requires that the property right of the subaqueous lands shall remain in the state of Michigan, and the unsurveyed islands are part thereof, and subject to the same policy, then the property right in the islands one and two is in the state of Michigan and not in the United States. (43.)

In People vs. Warner, Justice Hooker said,

"If it was not then in existence, it became the property of the State by virtue of its ownership of the submerged land at the bottom of the lake." (232.)

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NOTE 43—Packer vs. Bird, 137 U. S., 661, 666-7, 672 (1891);
Sherwood vs. Land Comrs., 113 Mich., 227-8 (1897)
People vs. Warner, 116 Mich., 228 at 232 (1898);
State vs. Fishing & Shooting Club, 127 Mich., 580 (1901).

In State vs. Fishing and Shooting Clubs, Justice Hooker said,

"If it was a part of the bed of the lake at the time defendant began to improve it, it belonged to the State, and if it could be said to be an island at that time, such island might belong to the state. Whether it did or not, would depend upon its character in 1836, when the state was admitted." (591.)

**Islands belong to riparian,** if subaqueous lands do not.

If for any reason, on account of treaty or otherwise, public policy requires that the proprietary title to subaqueous lands in St. Mary's river shall remain in the state of Michigan, it does not require that the title to the islands shall remain either in the state, or in the United States.

It cannot be that public policy requires that the title to **unsurveyed islands** in St. Mary's river shall remain in the United States, while such policy does not require that the title to **surveyed islands** in said river shall so remain. There cannot be a requirement of public policy as to title to **unsurveyed islands** which does not apply to the title to **surveyed islands.** The uniform policy as to surveyed islands has been to part with title to the same. So also as to one unsurveyed island No. 5, only a few hundred feet from islands one and two. (Treaty of 1855-6, 11 Stat. 631.)

The **state** of Michigan, if it can, **has turned over the proprietary interest in the subaqueous lands** of St. Marys River to the riparians. The title of the riparian is, however, of course, subject to the full control of the same by the United States so far as necessary for purposes of navigation, and the full control of same by the State for all public purposes. What further right in such subaqueous lands could in any way aid in carrying out treaty obligations? The making of treaties, and by necessary implication, the carrying out of treaty obligations, rests with the United States under the constitution. Hence, so far as necessary to the carrying out of treaty obligations of the United States, the control of the waters and subaqueous lands of the St. Mary's River necessarily remains in the United States. Subject to such control, what reason of

public policy prevents the proprietary ownership thereof by the riparian?

The treaty obligation suggested is that "It was agreed * * * * that all the water communications * * * * shall be free and open to the use of the citizens and subjects of both countries." We have shown that the treaty contains no such provision, but if the same can be read in by construction, we cannot imagine how the riparian ownership of the subaqueous lands of the St. Mary's River could interfere with such use of the water communications. The use of such "water communications" can relate only to navigation, in respect to which Congress has ful control of all navigable waters, including the subaqueous lands.

Herein, the rights of the State and Nation, as such, grow out of, attend upon, and are measured by, their needs.

Hence we fail to see how treaty obligations of the United States forbid the alienation, by the state of Michigan, of the proprietary interest in the islands, or subaqueous lands, of the St. Mary's River.

The Provisional Articles of 1782, article 8, and the Definitive Treaty of Peace of 1783, article 8, both provide that

"The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." (8 Stat. 57 and 83.)

These treaty provisions remain in force. (44.)

We cite seventeen cases (Note 24) to the effect that "the riparian owns the subaqueous lands on the Mississippi River."

Three of those cases, one decided in 1860, one in 1885, and one in 1890, are by this Court.

To the same effect are numerous cases on Det[illegible] River, St. Mary's River and St. Croix River.

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NOTE 44—Senate Document 318, 58th Congress, Second Session. Senate Documents, Vol. 37, pp. 290, 296.

## Stare Decisis.

In the first instance, it may be true, as said by Justice Powell, that "Nothing is law that is not reason." But, after a decision has been rendered, the language of Sir Wm. Jones is more important. He says, respecting the maxim of Powell, "This is a maxim, in theory, excellent; but in practice dangerous; as many rules, true in the abstract, are false in the concrete."

"It is not always that Courts may freely inquire, in determining a case before them, What is the law? Sometimes investigation should stop when it is ascertained what has been decided upon the subject." Harrow vs. Meyers ,29 Ind., 69, at p. 470.

"That judge who * * * would overturn a rule which for years had settled the rights of property, should be regarded as the common enemy of mankind, and as unworthy of the high trust that had been confided to him." Welch vs. Sullivan, 8 Calif., 165, 188.

"None but the strongest reasons would justify."

"Fickleness in Courts is always to be deprecated, but especially in matters relating to titles to real estate." Pioche vs. Paul, 22 Calif., 106, 110.

"The error would have to be the most palpable to justify this Court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property; and they are not to be tampered with to suit the views of different persons." Reed vs. Owmby, 44 Mo., 204, 206.

This construction having become a rule of property, it should not be changed without an imperious necessity." Taylor vs. French, 19 Vt., 49, 53.

"When a rule of property has been once deliberately adopted and declared, it ought not to be disturbed by the same Court, except **for very cogent reasons**. Otherwise the community would never be able to deal with safety and would be in a state of perplexed uncertainty as to the law." Goodell vs. Jackson, 22 Johns., 693, 722.

"But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been **res nova**, it is not at liberty to disturb or unsettle such decision unless impelled by the **most cogent reasons**. Baker vs. Lorillard, 4 N. Y., 257, 261.

"When, as in this case, the decision has relation to large amounts of a species of property which assumes a value in the market, changes hands and is dealt with upon the confidence reposed in the correctness of the decision of the highest judicial tribunal in the State, nothing short of the most urgent necessity, to prevent injustice, or vindicate clear and obvious principles of law, would justify us in departing from it." Kearny vs. Buttles, 1 Oh. St., 362, 366.

"It would be better, no doubt, if all judicial decisions were made upon correct logical principles, but that cannot be while intellectual infirmity exists, and experience has shown that it is less injurious to endure the evils of an unsound precedent than to change it when the result would cause confusion and disappoint and damage parties who have relied upon it as an established rule of law." Paulson vs. Portland, 16 Oreg., 450, 457.

"That decision was rendered by judges occupying the same position as we do, and, while we do not indorse it, nor regard the reasons upon which it was predicated as satisfactory, yet we do not feel at liberty to depart from it in this particular case." Corvallis vs. Stock, 12 Oreg., 391.

"To overthrow decisions thus made, except upon the most cogent reasons, would be productive of the highest mischief." Bellows vs. Parsons, 13 N. H., 256, 261.

"Such rules become landmarks and ought to be preserved like ancient monuments or immemorial boundaries to land." Anderson vs. Jackson, 16 Johns., 382, 402.

Fisher vs. Horicon I. & M. Co., involved the consideration of the constitutionality of the mill dam law, so called. Justice Cole said,

"The main question which we are invited to consider is the constitutionality of the mill dam law. This question we cannot regard as open for investigation and discussion at the present time. It was fully and carefully considered * * * in the case of Newcome vs. Smith * * * and the constitutionality of the law affirmed." (10 Wis., 351-2.)

"Considerations of this nature, relating to questions of property acquired under the belief that a former decision was correct, cannot be disregarded when we are called upon to set such decision aside. The rule **stare decisis** has great force in such a state of things and emphatically applies." (354.)

Babb vs. Mackey involved the constitutionality of the mill dam law. Therein Justice Cole said, referring to the case of Fisher vs. Horicon I. & M. Co.:

"We are earnestly pressed by counsel who denied that power, and the validity of our present law, to reconsider the decision of the former Supreme Court in the case of Newcome vs. Smith * * * * For reasons given in the opinion in that case, we have declined to depart from the doctrine laid down in Newcome vs. Smith, and consequently the power of the legislature to pass such laws is not now an open question. (10 Wis., 371-377.)

**Absence of legislative action emphasizes the r[illegible]e.** (45.)

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NOTE 45—Emerson vs. Atwater, 7 Mich., 12 at 23 (1859);
Loeb vs. Mathis, 37 Ind., 306, 312 (1871);
Lemp vs. Hastings, 4 Ia., 448, 449-50 (1854);
Pioche vs. Paul, 22 Calif., 106, 110 (1863);
Rockhill vs. Nelson, 24 Ind., 422, 424 (1865);
People vs. Cicott, 16 Mich., 283, 310 (1867);
Grubbs vs. The State, 24 Ind., 285, 296 (1865).

Emerson vs. Atwater did not relate to water rights or riparian rights, but to a general question respecting title to land. Therein, Justice Manning said,

"We refer to these cases to show the general understanding of the bench and bar on this subject, and the injustice that would be done by overruling, at this late day, the case of Wadsworth vs. Loranger, to those who may have looked to that case for the law, and have acquired rights under the law as there laid down. This consideration, of itself, if we believe that case to be erroneous in principle, which we do not, would cause us to hesitate long before overruling it, believing it would be both better and safer to leave it to the legislature to correct the error than to undertake it ourselves, as all intervening rights would in that case be saved, and injustice be done to no one." (23.)

This suggestion that "it would be both better and safer to leave it to the legislature to correct the error," if there be any, is peculiarly applicable to the question under consideration. The rules respecting riparian rights are general and have wide application and are well known, and the legislature must be supposed to know the general effect and tone of the decisions. Their silence respecting them amounts to ratification.

Loeb vs. Mathis involved a question of practice in trespass upon real estate. Justice Gregory said,

"But whatever opinion may be entertained of the 28th section of the code, independent of the adjudged cases, it cannot now, as a rule of construction, be considered an open question. A long line of uniform decisions construing a statute, in the face of the fact that the legislature, for a long series of years, has acquiesced in such construction, cannot, with any judicial propriety, be disregarded or lightly treated." (312.)

Lemp vs. Hastings related to place of taxation. Justice Greene said,

"If the principle established by that case has not been changed by legislation since 1850, it follows that the rule adopted in that case should govern in this. When a rule or principle of law has been fully recognized by the Supreme Court, it should not be overruled unless it is palpably wrong,

or has been changed by legislative enactment. In reference to the principles involved in this case, there has been no such change. (449-50.)

Pioche vs. Paul involved constitutionality of legislation. The court said,

"No attempt has been made by the legislature since the invalidity of the act * * * * was declared by this Court, to re-enact the same in a form free from constitutional objections. Under these circumstances, this court is asked to review its decision in that case and to overrule it." (110.)

Rockhill vs. Nelson related to the descent of property under the statutes. Justice Gregory said,

"There are some questions in law the final settlement of which is vastly more important than how they are settled, and among these, are rules of property long recognized and acted upon, and under which rights have vested. * * * We cannot change a decision without producing a confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if canon of descent as settled by the determination of the Court of last resort is unjust or even distasteful, the legislature can change the rule by new statute without interfering with vested rights." (424.)

The People vs. Cicott related to election by ballot. Therein Justice Christiancy said,

"But the rule in People vs. Tisdale was recognized in People vs. Higgins, 3 Mich., 233, and has now been the settled law of this state for a quarter of a century. * * * The legislature have full control over this question and may change the rule when the public sentiment shall seem to require." (310.)

Grubbs vs. The State was a prosecution for violating a statute. Therein Justice Frazer said,

"This very question was decided by this Court against the validity of the enactment more than five years ago. * * * Three legislatures have since held their sessions and adjourned without, we believe, even attempting to enact the provisions

thus held void, in a form which would be free from the constitutional objections then urged to exist. * * * We ought, in any case, to proceed with great caution in reversing opinions heretofore pronounced by this Court and received and acted upon as settling the law. And especially when a rule of property would be overturned, and that would be made criminal which had before been adjudged lawful. In such cases, it were even better that what is settled should not be disturbed by judicial action, though it be wrong." (296.)

The rule, **stare decisis**, is nowhere of more importance than in relation to the rights of riparians. This Court recognizes the control of each state over the matter of riparian rights. (46.) Each state recognizes the fact that it, for itself, makes the law. This law is made by legislation, or, in its absence, by judicial decision.

In Barney vs. Keokuk, Mr. Justice Bradley said,

"Whether as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights, which properly belong to them in their sovereign capacity, it is not for others to raise objections." (338.)

This language is quoted with approval by Mr. Justice Field, in Packer vs. Bird, at 671.

In Webber vs. Pere Marquette Boom Co., Justice Champlin said,

"It is settled in this state that the title of the riparian extends to the middle line of the lake or stream of the inland wa-

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NOTE 46—Barney vs. Keokuk, 94 U. S., 324 at 338 (1876);
Packer vs. Bird, 137 U. S., 661 at 671 (1891);
Webber vs. Pere Marquette Boom Co., 62 Mich., 626 at 636 (1886);
Hall vs. Alford, 114 Mich., 165 (1897);
Hardin vs. Jordan, 140 U. S., 371, 384, 387 (1891);
Franzini vs. Layland, 120 Wis., 72 at 78 (1903);
Porterfield vs. Clark, 43 U. S., 76 at 125 (1844).

ters * * * This has become a rule of property in this state, and the Supreme Court recognizes the right of each State to determine the doctrine for itself." (636.)

Hall vs. Alford involved riparian rights on navigable waters. Therein, Chief Justice Long adopted the language above quoted from Webber vs. Boom Co. (168.)

Hardin vs. Jordan holds to the rule of the State of Illinois, relative to title of submerged lands at date of patent, though the State Court had departed from it. Therein Mr. Justice Bradley said,

"We do not think this argument **ab inconvenienti** is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation." (397.)

In Franzini vs. Layland, Justice Marshall said,

"There is no opportunity now for retreat. The State has taken its position, and property rights upon all our rivers have become vested with regard thereto, and the Supreme Judicial authority has many times affirmed that it possesses discretionary authority to part with its trust property to the extent mentioned.—That is in such ways as do not substantially affect the purposes of the trust." (82.)

In Porterfield vs. Clark, Mr. Justice Catron said,

"The rule in this Court is settled that each state has the right to construe its own statutes and especially those barring titles. In the case of Green vs. Neal, 6 Peters, 291, it was held that this Court uniformly adopted the decisions of the state tribunals respectively in construing their statutes. That this was done as a matter of principle in all cases where the decisions of the state Court had become a rule of property." (125.)

This Court has determinedly sustained rules of property once established by the state courts. Where property has been acquired or contracts made in view of, and on faith in, a settled rule established by the State Courts, the federal Courts

will not depart from such established rule on account of subsequent variant State decisions. (47.)

The Chandler Patent bears date December 15, 1883 (comp. Rec. 15). The rights of the patentee should be determined by the law as it then stood.

There can be no doubt that, at that time, the settled doctrine in Michigan was that the riparian owner, on the small inland lakes, and on the rivers, of Michigan, owned to the middle thread of the lake or stream. Such doctrine plainly appears in the decisions rendered before the issue of the patent (48), all but one of which was rendered before the application of Chandler to locate.

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NOTE 47—Hardin vs. Jordan, 140 U. S., 371, 384, 389, 397, (riparian rights) (1891);
Morgan vs. Curtenius, 61 U. S., 1 (title to lands) (1857);
Gelpcke vs. Dubuque, 68 U. S., 175 (municipal bonds) (1863);
Muhlker vs. R. R., 197 U. S., 544 (eminent domain) (1905);
Lee County vs. Rogers, 74 U. S. 181 (county bonds) (1868);
Douglas vs. Pike County, 101 U. S., 677 (county bonds) (1879);
Supervisors vs. Schenck, 72 U. S., 772, 785 (county bonds) (1866).

NOTE 48—Lorman vs. Benson, 8 Mich., 18, (Detroit River) (1860);
Rice vs. Ruddiman, 10 Mich., 125, (Muskegon Lake) (1862);
Ryan vs. Brown, 18 Mich., 196, (St. Mary's River) (1869);
Clark vs. Campau, 19 Mich., 325, (Detroit River) (1869);
Watson vs. Peters, 26 Mich., 508, (Saginaw River) (1873);
Bay City Gas Light Company vs. Industrial Works, 28 Mich., 182, (Saginaw River) (1873);
Attorney General vs. Booming Company, 34 Mich., 462, (Muskegon River) (1876);
Backus vs. Detroit, 49 Mich., 110, 114-5, (Detroit River) (1882).

**STARE DECISIS**

Rice vs. Ruddiman involved the rights of riparians on Lake Muskegon. No special case was referred to, but Justice Christiancy, referring to common usage, said,

"To repudiate this common usage at this late day, by creating an arbitrary distinction which has no foundation in the nature of things, and to recognize in the State, or the United States, a proprietorship in the beds of the hundreds of lakes and natural ponds within her limits wouuld, in my opinion, be an unwarrantable interference with private property, and do incalculable mischief." (142.)

## RIVER OR STRAIT.

The complaint says that the complainant is the owner of islands one and two "situated in the Straits of St. Mary." (Comp. Rec. 1.) (See also O'Hare's Map, Ex. 37.) The answer says that these islands ar[illegible] the **River** St. Mary, and not in the **Strait** of St. Mary. (An[illegible] Par. IV, Rec. 21-2.) Evidently the complainant wishes to avoid the well established rule of ownership by the riparian of the subaqueous lands, and hence classifies the stream running past islands one and two as a **strait** and not as a **river**. So far as we know, this stream has been uniformly called a river until defendant herein filed its bill in equity against the Michigan Lake Superior Power Co. to restrain diversion of the water of the river through its hydraulic canal. In that case, the Michigan Lake Superior Power Company, for the first time, classified the stream as a **strait** and not a **river**. (Rec. 583 to 588.) It had, before that time, classified the stream as a **river**, after it knew of its contention with the defendant herein respecting the diversion of the water (H. Doc. 358-56-1, pp. 7, 8, 14, 15, 30-1-2, 44-5, 50). See also schedule attached to application of M. L. S. P. Co. to the supervisors of Chippewa County on October 10, 1898. (Rec. 596.) See also enabling act (No. 154, Act. Cong., 1901-2, Rec. 598.) The articles of organization of the M. L. S. P. Co. state that the business and object of said company was to be

"To excavate and construct and maintain * * * * a canal or canals from point above the falls of St. Mary's river * * * to some point or points on said river below said falls." (Rec. 594.)

Also see Cady's application (Rec. 568).

**Straits** and **Rivers** have been defined as follows:

### Definitions of Strait.

"A narrow pass or passage, either in a mountain or in the ocean, between Continents, or other portions of land; as, the Straits of Gibraltar, the Straits of Magellan, the Straits of Dover."

Webster's Dict., Ed. of 1859 and Ed. of 1875.

"A (comparatively) narrow passageway connecting two large bodies of water—often in plural; as the Strait or Straits of Gibraltar, the Straits of Magellan, the Strait or Straits of Mackinac."

" 'We steered directly through a large outlet which they called a strait, though it be fifteen miles broad.' De Foe."

Webster's Dict., Ed. of 1895.

"1. A narrow passage of water connecting two larger bodies of water. Often plural, as Hudson Straits, the Straits of Gibraltar."

Standard Dict., Ed. of 1895.

"A narrow passage of water connecting two bodies of water."

Century.

**Definitions of River.**

"A large stream of water flowing in a channel on land toward the ocean, a lake, or another river. It is larger than a rivulet or brook; but is applied to any stream from the size of a mill stream to that of the Danube, Amazon and Mississippi. We give this name to large streams which admit the tide and mingle salt water with fresh, as the Rivers Hudson, Delaware and St. Lawrence." Webster's Dict., Ed. of 1859.

"A large stream of water flowing in a channel on land toward the ocean, a lake, or another river. It is a stream larger than a rivulet or brook." Webster's Dict., Ed. of 1875.

"A large stream of water flowing in a bed or channel and emptying into the ocean, a sea or lake, or another stream; a stream larger than a rivulet or brook." Webster's Dict., Ed. of 1895.

"A stream of water larger than a brook, creek, or rivulet, and discharging into a larger body of water, as the ocean, a lake, or another stream." Standard Dict., Ed. of 1895.

"As a general proposition, wherever there is a steady, uniform current of water, it constitutes a river, though this does not include a lake through which there is a current from its head to its outlet." Emory Washburn, Am. Law of Easement, p. 209, quoted in Standard Dict., under head "River."

"A considerable body of water flowing with a perceptible current in a certain definite course or channel and usually without cessation during the entire year."

"In law a stream of flowing water of greater magnitude than a rivulet or brook."

"The Orinco * * * is over three miles wide at 560 miles from its mouth." Century Dic.

"The width of the main mouth (of the Amazon) is 50 miles." Century Dict., Val. proper names, p. 48.

"River. A body of flowing water of no specific dimensions, larger than a brook or rivulet, less than a sea; a running stream pent on each side by walls or banks.

A considerable stream of water that has a current of its own flowing from higher level which constitutes its source to its mouth, where it debouches." Anderson's Dict., p. 908.

"When it appears that the water is not a lake nor a pond * * * the only criterion by which to determine whether it is a river is the existence of a current."—Angell Water Courses, p. 7, Section 4f.

"A river is a running stream of water." Gould on Waters, Sec. 41.

"Rivers are 'bodies of water of considerable size, flowing with perceptible currents in definite channels and rarely without cessation during the year.'" Encyc. Am.

If, at any point in the water communication between Lakes Huron and Superior, there is what may properly be

called a river, it is at the rapids, where the stream passes islands one and two.

## Treaties.

It seems to us that the most authoritative classification of the stream is that made in **Treaties** and **Negotiations** resulting in Treaties, respecting it. Such documents are drawn with the utmost care, and every expression is thoroughly scrutinized before the treaty is adopted. We take the following excerpts from divers treaties respecting this stream:

"Beginning at the Big Rock in the River St. Mary's, on the boundary line between the United States and the British province of upper Canada." Treaty June 16, 1820, negotiated by Cass. (7 Stat. 206.)

"Through the Straits and River St. Mary's to a point in Lake Superior." Treaty of March 28, 1836, negotiated by Henry R. Schoolcraft. (7 Stat. 491.)

"Until it strikes a line * * * * passing across the river at the head of St. Joseph's island and at the foot of the Nebish Rapids, which line denotes the termination of the boundary directed to be run by the sixth article of the Treaty of Ghent." (Decision of Commissioners under Sixth Article of Treaty of Ghent, 8 Stat. 276.)

"Thence west of Jonas Island into St. Mary's River to a point in the middle of that river about one mile above St. George's or Sugar Island, so as to appropriate and assign the said island to the United States. Thence adopting the line traced on the map by the Commissioners through the River St. Mary to Lake Superior, to a point north of Isle Royal." Webster-Ashburton Treaty, Art. III. (8 Stat. 573.)

"A small island in the River St. Mary's adjacent to the camping gropnd." Treaty, August 2, 1855, (11 Stat. 631.)

Speaking of St. George's Island, Mr. Barclay, English Commissioner, said, "An additional reason for giving Great Britain the power to control the navigation at the St. Mary's River." (Moore Int. Arb., Vol I, p. 177.)

**Legislative Acts.**

It seems to us that the second most authoritative classification is that made in **legislative acts**, referring to the same as a boundary.

Act of Ter. Mich., Dec. 22, 1826, organizing County of Chippewa, gives as part of its boundaries:

"Beginning on the north side of Lake Huron, at Isle St. Vital, running thence due north until it strikes a river which falls into the north-west part of Muddy Lake of the River Sainte Marie, thence up said river to its source, thence west." (Territorial Laws Michigan, Vol. 2, P. 295.)

Act to incorporate Chippewa Portage Co. gives right to construct railway from "the Ste. Marie River." (Mich. Law 1847, P. 98.)

Act of Territory of Michigan, April 12, 1827, in giving boundary of the township of St. Marie, says, "returning with said line down the St. Marie River to the place of beginning." (Ter. Laws Mich. 2, P. 481.)

Act 39, 1883, authorized corporations organized under it,

"To divert into any canal, excavated or constructed under the provisions of this act, whether from Lake Superior or St. Mary's River." (Compiled Laws 1897, Sec. 6797.)

The general law of Michigan respecting fishing refers to "The Sault Ste. Marie, St. Clair, Saginaw, and Detroit Rivers." (Compiled Laws of 1897, Sec. 5808, 5865.)

See also Laws of Michigan, 1847, P. 104, also 1849, P. 46.

RIVER OR STRAIT

The islands in "The River St. Mary's." Acts Congress, 1847, 9 Stat. 146.)

In 1852, Congress referred to this stream as the "St. Mary's River." (10 Stat. 35.)

In 1882, Congress authorized the international railroad bridge, "across the Sainte Marie River, at or near the rapids in said river * * * * for the use of, and connection of, railroads whose business crosses or will cross the river at said locality, and whose lines of road are now, or may hereafter, approach the river at that place * * * * all the trains of all the roads terminating at said river at that place * * * * the free navigation of the said river within the waters of the United States." (2 Stat. 154.)

Again in 1896, Congress provides for,

"Anchorage of vessels and rafts in St. Mary's River from Point Iroquois, on Lake Superior, to Point Detour, on Lake Huron * * * * to detail one or more revenue cutters for duty on said river."

In 1898-9, Congress legislated for lights at the "Head of St. Mary's River, Michigan. Sets of range lights to mark the channel at the entrance of St. Mary's River." (30 Stat. 602.)

Act of Congress approved June 13, 1902, licensed the M. L. S. P. Co. "to divert water from the St. Mary's River into the water power canal now being constructed at Sault Ste. Marie for water power purposes." (57th Congress, 1st Sess. No. 154, P. 361.) Said act also in several other places refers to "Said river" and "the River Saint Mary's."

Probably there has not been a session of Congress since 1877 in which there has not been legislation wherein this stream is classified as a river. Neither has there been, probably, a year since 1877 in which the stream has not been classified as St. Mary's River in the report of the Chief of Engineers

to the War Department submitted to Congress by the President with his annual message. In fact, we think that this stream has never been mentioned in any public or official document of the State of Michigan or of the United States, otherwise than as a river.

Acts of Ontario call it "St. Mary's River," Laws 1889, Ch. 88. Rec. 333.)

**Official Documents.**

In his opinion given to the M. L. S. P. Co., March 14, 1899, the Hon. Horace M. Oren, Attorney General, says,

"You have asked me to give you an official opinion upon the question of what rights the Michigan Lake Superior Power Company, a corporation created and organized under and by virtue of Act No. 39 of the Session Laws of the State of Michigan for the year 1883, has to draw water from the upper level of the St. Mary's River, and the lower end of Lake Superior, into a canal debouching from the St. Mary's River above the rapids, and returning to the river at a point below the rapids, at Sault Ste. Marie, Michigan." (Opinions 1899, P. 109.)

U. S. Geolog. Surveyor Irving calls this water "St. Mary's River." (U. S. Geolog. Survey, 5th Ann. Rep. 1883-4, pp. 187-8-9, 223-4, 227.)

Houghton, State Geologist, thus states the place of beginning of the River St. Mary:

"Commencing with the mainland at the first or lower point of contraction in the Montreal channel of the Ste. Marie river. * * * At that point in the Montreal channel before alluded to, the first perceptible current was noticed, and this may, therefore, in reality, be considered as the termination of this arm of Lake Huron, as well as the commencement of the Ste. Marie River." (Mich. S. D. 1840, Vol. 2, pp. 72-73.)

U. S. Engineer Haskell gives the length of the river as 62

miles along the main channel; and the fall as 20.74 feet; and says,

"The stream is one that would be called permanent."

(App. C. C. C., P. 4093. Report of Chief Engineers, 1897.)

This stream is called a river in Foster and Whitney's report, 1850. (Ex. Doc. No. 69, 31st Congress, 1st Session, at pp. 1, 18, 27, 31, 32, 50, 53. Part II., pp. 13, 155, 268, 269, 397.)

Same is called "St. Mary's River" in Lake Survey Charts introduced by complainant. (Rec. 212.)

Down to January 21, 1903, this stream had, so far as we can learn, been uniformly called, by all departments of the United States, a river. But on that day, the Secretary of the Interior, in a letter to the Department of Justice, calls it "St. Mary's River or Strait." (Rec. 255.) Same in first bill filed by United States. (Rec. 659.) Same in letter of Attorney General to Mr. Covell. (Rec. 684.) In the bill herein and in the answer of the M. L. S. P. Co., to the bill of Ch. D. W. P. Co., it is called "Straits of St. Mary."

There seems to be an intent to classify this stream as a strait for the purpose of argument in this case and the case of Ch. D. W. P. Co. vs. M. L. S. P. Co. But the War Dept. has not adopted the new classification. In every annual report from 1878 to 1907 inclusive, this stream is called St. Mary's River. (For 1907, see Ann. Rep. Chief of Eng'rs 685. 687. 690. 691. 2009. 2036. 2059. 2457.) Such classification was adopted in 1902 with approval by Francis H. Clergue, President of the M. L. S. P. Co. (Rep. 1905, p. 326.)

**Cyclopedias.**

Americana, "Saint Mary's, a river connecting Lake Superior and Lake Huron * * The river is spanned by the International Bridge * * There are a number of well-wooded islands in the river."

Century, "St. Mary's river. 1. The outlet of Lake Superior into Lake Huron, 55 miles." (P. 885.)

"St. Mary's Falls. The rapids in St. Mary's River between Lakes Superior and Huron." (P. 900.)

Brittanica, "St. Mary's River, 55 miles long, is the only outlet from Lake Superior, and its course to Lake Huron is but a succession of expansions into lakes and contractions into rivers."

Johnson's Universal, "St. Mary's River: A stream which flows from Lake Superior to Lake Huron, and has a length of about 40 miles."

Chamber's, "St. Mary's River; the strait connecting Lakes Huron and Superior with a 'Sault' or rapids falling 20½ feet."

Longman's, p. 1347. "St. Mary's River, the river connecting Lakes Superior and Huron."

New International, V. 12, p. 337, "St. Mary's River, the channel connecting Lake Superior with Lake Huron. It flows 40 miles south-eastward."

## Early History.

The earliest description we find of this stream of water is in the correspondence of the Jesuit missionaries with their Superiors.

The third volume of Smith's History of Wisconsin gives a translation of some of these documents, the originals of which are to be found in the library of Harvard College.

A letter from the mission at Sault Ste. Marie in 1647-8 says of the Algonquin nations,

"Who dwell upon the shores of another lake, still larger than the 'Mer-douce' (fresh-water sea), into which it discharges itself by a very large and rapid river, which, before mingling its waters with our 'fresh-water sea' makes a fall, or leap, that gives a name to those people who come to live there during the fishing season."

(Smith's History of Wisconsin, Vol. 3, p. 15.) This "Mer-

douce'' (fresh-water sea) was Lake Huron. (Parkman, French and English in North America, Part I, p. 366.)

In 1667, names had been given to these lakes and on November 10, 1667, one of these letters says,

"Toward the beginning of September, after having coasted along the shores of Lake Huron, we arrived at the Sault; it is thus that they call half a league of rapids in a beautiful river, that forms the junction of the two great lakes, Huron and Superior." (Ib. 39.)

Father Allouez in a report to his superior says of the Indians,

"They believe that the Superior Lake is a pond made by the beavers, the banks of which were double; the first, at the place which we call the Sault, the second, five leagues lower down. In coming up the river, they say, this same god first encountered the second embankment, which he tore entirely away; and for this reason there are no falls or turbulent waters at these rapids. As for the first, being in a hurry, he only walked over it and trampled it to pieces, in consequence of which there still remain large falls and boiling waters." (Ib. 59.)

In his History of the Jesuits in North America, Parkman speaks of the military post mentioned in complainant's complaint (Compt. P. 15). He says,

"The fortified works * * * lay parallel with the river, and somewhat more than a hundred feet distant from it. * * * The sides towards the river and the lake had no other defences than a ditch and a palisade." (P. 362.)

"Beyond the ditch or canal which opened on the river was a large area, still traceable, in the form of an irregular triangle, surrounded by a ditch, and apparently by palisades." (P. 363.)

Schoolcraft speaks of the Strait of St. Mary, and of the River St. Mary's. In Indian Tribes of the United States, he speaks of the River St. Mary in Part III, at P. 604, in Part IV,

at P. 192, in Part VI, at P. 202, 398. In Part VI, at P. 33, he speaks of "the Strait and River of St. Mary." He also says,

"The Lake or Strait may be supposed to cease and the River to commence at the foot of the first rapids called Miscoutin or Nebish, as there is no perceptible current below it." (Narrative Journal of Travels, P. 128.)

Hence it appears that he classifies a part of the water connecting Huron with Superior as a river, and part of it as a strait. So also does Geologist Houghton. So also did the Commissioners under the Treaty of Ghent.

**Legal Decisions.**

This stream is designated as St. Mary's River in divers legal decisions. (49.)

**Estoppel.**

The United States has continuously represented this stream to be a river. It has so designated it in its legislative acts, in reports of its public officers, and on its maps.

Map No. 2 of International line showing where same passes Islands one and two is entitled "Continuation of the Map of the River Sainte Marie." (Ex. 5, Rec. 78-9.) Also Map No. 1, same series.

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NOTE 49—United States vs. Repentigny, 72 U. S., 211 at 257 (1866);
Scranton vs. Wheeler, 113 Mich., 565-6 (1897);
Spaulding vs. Chandler, 160 U. S., 394 at 395, 403, 406 (1895);
Scranton vs. Wheeler, 179 U. S., 141 at 144 (1900);
Ryan vs. Brown, 18 Mich., 196 at 210-1 (1869);
Sherwood vs. Commissioners, 113 Mich., 227 (1897);
Scranton vs. Wheeler, 57 Fed., 803 (1893);
Kemp vs. Stradley, 134 Mich., 676 (1903).

RIVER OR STRAIT

Map of Mullett's Survey of 1845 shows on Town. 47 N., Range 1 E., "St. Mary's River." (Ex. 1, Rec. 76.)

Map Reservation, Sept. 2, 1847, shows "St. Mary's River." (Ex. 12, Rec. 139.)

Map of Designation of March 10, 1852, shows "St. Mary's River." (Ex. 15, Rec. 146.)

Map Designation August 3, 1852, shows "Saint Mary's River." (Ex. C. 20, Rec. 160.)

Whelpley's Map of his survey shows "River Ste. Marie Rapids." (Ex. 23, Rec. 163.)

Patent to Chandler bounds the grant "by the River St. Mary on the east, north and west."

In all subsequent dealings between the United States and Chandler's grantee, defendant, the stream has been called St. Mary's River.

After the United States has sold by plat, it cannot dispute the truth of the plat. (50.)

"Such plat becomes an essential part of the description itself." (51.)

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NOTE 50—Bates vs. R. R., 66 U. S., 204 (1861);
Lindsey vs. Hawes, 67 U. S., 554 (1862);
R. R. vs. Schurmeir, 74 U. S., 272 (1868);
R. R. vs. R. R., 26 Minn., 31, 34 (1879).

NOTE 51—Shoefelt vs. Spaulding, 37 Wis., 662, 668 (1875).

## AD HOMINEM.

Counsel charges Chandler, patentee, with being a speculator.

In answer, we call attention to a letter written by Mr. Chandler on May 19, 1883, to Major Farquhar, of the U. S. Engineering Corps at Detroit, wherein Mr. Chandler said,

"I will submit the same proposition to you that I made verbally to your predecessor, Genl. Weitzel, regarding the terms upon which the United States could secure a title, provided the appeal proceedings are decided in my favor.

1st. Should the United States wish to secure this tract of land for canal purposes, I will make deed to the same for any compensation that you and Mr. Wheeler may after investigation of all the facts concerning my location of the same, deem just and equitable.

2nd. Should the United States only desire the title to the lower end of the tract, I will deed that portion of it without compensation." (Rec. 559.)

The Mr. Wheeler referred to was E. S. Wheeler, the general superintendent of the United States canal, and engineer in charge of the Government works at Sault Ste. Marie.

March, 1908.

ARCH. B. ELDREDGE,
Solicitor for Appellee.

MOSES HOOPER,
JOHN H. GOFF,
Of Counsel.

# Synoptical Index

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# UNITED STATES *v.* CHANDLER-DUNBAR WATER POWER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 599. Argued April 6, 7, 8, 1908.—Decided April 20, 1908.

Statutes of limitations with regard to land affect the right even if in terms only directed against the remedy. The act of March 3, 1891, c. 561, § 8, 26 Stat. 1099, providing that suits to vacate and annul patents theretofore issued shall only be brought within five years after the passage of the act, applies to a void patent, and where suit has not been brought within the prescribed period a patent of public lands, whether reserved or not, must be held good and to have the same effect as though valid in the first place.

On the admission of Michigan to the Union the bed of the Sault Ste. Marie, whether strait or river, passed to the State, and small unsurveyed islands therein became subject to the law of the State.

By the law of Michigan a grant of land bounded by a stream whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof, and under this rule the patentee of government

land bordering on the Sault Ste. Marie, takes to the center line, including small unsurveyed islands between the main land and the center line; nor are the rights of riparian owners to the center affected by the fact that the stream is a boundary.

152 Fed. Rep. 25 affirmed.

THE facts are stated in the opinion.

*The Attorney General, The Solicitor General* and *Mr. Duane E. Fox*, special assistant to the Attorney General, for the United States.[1]

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[1] The brief, on behalf of the United States, of over 280 pages, presented the case in the following manner as appears by the index of the brief:

Statement of the case; manner in which the questions are raised; the questions involved; specifications of errors.

Argument, I. The law of the waters; A. Locus of the islands; B. The status of the waters established by treaties; (1) The treaties of peace (Paris); (2) The treaty of Ghent; (*a*) Boundary established under Article VI; (*b*) Boundary established under Article VII; (3) The Treaty of Washington (Webster-Ashburton treaty); (4) Other treaty provisions; C. The status of the waters established by the law of nations; D. The law of riparian and littoral ownership; (1) Public and private waters; (2) The Great Lakes; (3) The connecting waters between the Great Lakes; (4) Legislative recognition by the State of Michigan of the public character of the connecting waters between the Great Lakes; (5) Michigan cases distinguished; (6) State decisions—how far controlling; (7) The distinction between inland waters of a State and international waters; (8) The question a political one; E. Former construction by the Government.

II. Title to Islands 1 and 2 in the United States.

III. The islands and adjacent shore land reserved for public uses; A. Historical statement and authorities; B. Effect of order of December 9, 1852, releasing portion of lands previously reserved; (1) The reservation of 1822; (2) The general temporary reservation of April 3, 1847; (3) The specific reservation of September 2, 1847; (4) The specific and final reservation under the act of 1850; (5) The Indian reserve of an easement; C. Further contemporaneous construction.

IV. Land in Chandler patent never surveyed.

V. Said land not subject to location with Porterfield scrip; A. Lack of legal survey; B. No price established for said land; C. Said land otherwise appropriated at the time of such location; (1) Effect of the military reservation; (2) The land within the limits of an incorporated town.

VI. The interest of the United States in this suit; A. International obligations of the United States; B. The locus needed for works in aid of commerce; C. Refusal by Circuit Court to consider the validity of appellee's alleged title to adjacent shore; D. Employment of special counsel.

*Mr. Arch B. Eldridge, Mr. Moses Hooper* and *Mr. John H. Goff* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the United States to remove a cloud from its alleged title to two islands, numbered One and Two, in the Sault Ste. Marie, between Lake Huron and Lake Superior. The islands are in the rapids of the river or strait, on the American side of the Canada boundary line, and near to a strip of shore lying between the rapids and the United States ship canal referred to in *United States* v. *Michigan*, 190 U. S. 379. The defendant claims this strip and the islands under a patent from the United States, dated December 15, 1883, describing the land as bounded by the river St. Mary on the east, north and west. The United States says that the patent was void because the land had been reserved for public purposes, and that even if it was valid the islands did not pass. The defendant replies that the land was not reserved, and also sets up the statute of limitations. Act of March 3, 1891, c. 561, § 8. 26 Stat. 1099. The Circuit Court dismissed the bill, and its decree was affirmed by the Circuit Court of Appeals. 152 Fed. Rep. 25.

There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be as-

VII. Statute of limitation not applicable.

VIII. Estoppel.

IX. Laches.

The appendix contained: A. Extracts from the report of the Commissioners under the treaty of Ghent; B. Diplomatic correspondence preceding the treaty of 1842; C. Extract from Article II of the treaty of 1842; D. Correspondence regarding the restoration of certain lands embraced in the temporary reservation of April 3, 1847; E. Commissions and correspondence showing the relation of special counsel to this case; F. Extract from letter of the Secretary of State to Lord Ashburton, dated July 27, 1842. There were also a number of maps.

sumed to be good. The statute just referred to provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to "any patent heretofore issued," it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell* v. *Warren*, 2 Black, 599.

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605; *Sharon* v. *Tucker*, 144 U. S. 533; *Davis* v. *Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476.

We waste no time upon suggestions of bad faith on the one side or the other, as there is no sufficient warrant for them, and as they were touched rather than pressed at the argument. The only other question is whether the United States has title to the islands, notwithstanding its patent and notwith-

standing the incorporation of Michigan as a State. The bill admits and alleges that the bed of the river, or strait, surrounding the islands, passed to Michigan when Michigan became a State, *Pollard* v. *Hagan*, 3 How. 212; *Shively* v. *Bowlby*, 152 U. S. 1, subject to the same public trusts and limitations as lands under tide waters on the borders of the sea. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. But it sets up that the islands remained the property of the United States, and it argues that in such circumstances the islands did not pass by the patent of the neighboring land.

The act offering Michigan admission to the Union provided that no right was conferred upon the State "to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said State." Act of June 15, 1836, c. 99, § 4. 5 Stat. 49, 50. And again, by a condition, that the State should "never interfere with the primary disposal of the soil within the same by the United States." Act of June 23, 1836, c. 121. *Fifth.* 5 Stat. 59, 60. The islands are little more than rocks rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the State of the bed of the streams surrounding them. If they did not, then, whether the title remains in the State or passed to the defendant with the land conveyed by the patent, the bill must fail.

The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387. This view is well established. *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 93, 94; *Hardin* v. *Shedd*, 190 U. S. 508, 519. The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as

stated in *Shively* v. *Bowlby*, 152 U. S. 1, 47, are that the State may use or dispose of any portion of the same "when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce." But it cannot be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interest of the public in the waters of the Sault Ste. Marie. See *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 271, 272. Therefore, if by the law of Michigan the bed of the river or strait would pass to a grantee of the upland, we may assume that it passed to the defendant, and we may assume further that the islands also passed. If, as we think, they belonged to the State, they passed along with the bed of the river. If they had belonged to the United States, probably they would have passed as unsurveyed islands and neglected fragments pass. *Whitaker* v. *McBride*, 197 U. S. 510; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 91, 92. Of course other nice questions are suggested and might be asked; for instance, how it would be if the title to the bed of the stream was in the State and did not pass with the upland, and the islands remained to the United States. It still would be a reasonable proposition that the islands followed the upland. But in the view that we have taken that may be left in doubt.

The question then is narrowed to whether the bed of the strait is held to pass by the laws of Michigan. We are content to assume that the waters are public waters. *Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457. But whatever may be the law as to lands under the great lakes, *People* v. *Silberwood*, 110 Michigan, 103, we believe that the law still is as it was declared to be in *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 94, that "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof," and that this

applies to the Sault Ste. Marie, whatever it be called. The fact that it is a boundary has not been held to make a difference. The riparian proprietors upon it own to the center. *Ryan* v. *Brown*, 18 Michigan, 196; *Scranton* v. *Wheeler*, 113 Michigan, 565, 567; *Kemp* v. *Stradley*, 134 Michigan, 676. See also *Scranton* v. *Wheeler*, 57 Fed. Rep. 803, 812; *S. C.*, 179 U. S. 141, 163; *Lorman* v. *Benson*, 8 Michigan, 18; *Water Commissioners* v. *Detroit*, 117 Michigan, 458, 462. We see no plausible ground for the claim of the United States.

*Decree affirmed.*

MR. JUSTICE HARLAN dissents.